NLRB-5224 Claimant Expense and Search for Work Report

10508.9 Calculate Backpay With Information Collected From Discriminatees

Since the decision whether to comply with a Board order often turns on the cost of doing so, the Region should provide respondents with estimates of backpay liability where doing so is likely to bring about an early resolution of the dispute. Sections 10540–10566.

10512 Determining Compliance Requirements

10512.1 Overview

Once the case is assigned to Compliance, the Region should analyze compliance requirements of the case, advise the parties of those requirements, and establish what actions the respondent must undertake to fulfill them. Compliance processing begins with analysis of the actions required by the remedial provisions of settlement agreements and Board orders. Every Board order in which a violation of the Act is found contains remedial provisions. Orders almost always contain negative provisions, requiring the respondent to cease and desist from the actions that were found unlawful. Orders often contain affirmative provisions also, requiring the respondent to undertake specific actions, either to remedy losses resulting from its unlawful action or to restore conditions to those that existed prior to its unlawful actions.

Informal settlement agreements always contain remedial provisions as well, devised to be consistent with Board orders that have been based on the same or similar circumstances and violations.

In many cases, remedial provisions will be self-explanatory and requirements for their effectuation clear and not subject to dispute. In other cases, requirements will be less clear or disputed by the parties. In these cases, it is the responsibility of the Compliance Officer to investigate the facts and circumstances of the case and to apply appropriate policies and Board precedent in order to achieve compliance or to recommend further action by the Region.

To investigate remedial requirements, the Compliance Officer should begin by becoming familiar with the facts of the case to date, including the results of the Region's administrative investigation and the administrative law judge's decision or Board order. The Compliance Officer will then have to discuss requirements with all parties, advising them of compliance procedures and requirements, eliciting their positions on compliance issues that might be in dispute, and obtaining information needed to settle or determine disputed issues.

The following sections provide guidance for the investigation of a range of compliance issues, as well as case authority and current policies to assist in their substantive determination. Guidance on procedures to follow upon issuance of administrative law judge's decisions can be found in Section 10506.7, upon issuance of Board orders at Sections 10596–10612, and upon issuance of court judgments at Sections 10614–10644.

10514 Negative Provisions

When the Board finds violations under Section 10(c) of the Act, it will issue an order requiring the respondent to cease and desist from further unlawful actions. Board orders are subject to judicial enforcement under Section 10(e). See Section 10632.5(a) regarding the scope of court judgments enforcing Board orders. The Compliance Officer should advise the charging party that it has a responsibility to apprise the Region of non-compliance with negative provisions. The Compliance Officer should not be content to wait for charging party reports of noncompliance, but should periodically check with the charging party regarding the status of compliance.

Negative provisions of settlements or Board orders, by their nature, require refraining from action rather than undertaking action. With the above actions undertaken by the Compliance Officer, it should be presumed that the respondent is complying with negative provisions, unless there is a complaint of noncompliance.

10516 Affirmative Provisions

Affirmative provisions of settlement agreements and Board orders require respondent action. Examples of affirmative requirements include offering reinstatement, paying backpay, withdrawing recognition from an unlawfully recognized union, and reimbursing employees for dues or initiation fees unlawfully deducted or for hiring hall fees unlawfully exacted. Some affirmative provisions are essentially self-explanatory; others, such as those requiring payment of backpay, almost always require investigation and determination.

Because they require action, affirmative provisions are generally the focus of attention in compliance processing. Sections 10518 through 10566 provide guidance in determining common affirmative provisions.

10518 Notice Posting

Settlement agreements and Board orders almost always require that the respondent post a remedial notice for 60 days. The purpose of the notice is to inform employees or members of their rights protected by the Act and to set forth publicly and in clear language the respondent's remedial obligations.

10518.1 Wording Fixed

The wording on the notice is established by the settlement agreement or Board order. Variation or substitution should not ordinarily be permitted in the course of compliance proceedings. Where, however, all parties agree that modification of the wording in the notice is warranted by changed circumstances, the Regional Director is authorized to grant such request to modify the notice. Where any party is opposed to the proposed modification, the Regional Director should advise the party seeking modification to file its motion with the Board.

10518.2 Location and Number of Notices

General posting provisions require that notices be posted wherever employee or member notices are customarily posted. When Board agents are negotiating the terms of settlement agreements, they should resolve potential posting issues and identify specific posting locations as part of the settlement process. Examples of posting locations include employee bulletin boards, timeclocks, department entrances, meeting hall entrances, and dues-payment windows. Small facilities may require only one notice; large facilities may require a great number.

In Board order cases or when specific posting locations have not been identified as part of a settlement, appropriate posting locations will depend on the circumstances of the case, and must be determined by the Compliance Officer. When the violation was committed by electronic means, such as by the use of e-mail, the Region should normally require the charged party to circulate a copy of the notice in electronic fashion on the same basis and to the same group or class of employees as were sent the electronic message which was determined to have violated the Act.[5] See Appendix 12 for suggested language to be included in informal settlement agreements.

10518.3 Preparation of Notices for Posting

The Region should provide notices for posting, with notice text printed on the appropriate blue and white form. The Region is provided with a copy of notice text with the issuance of an administrative law judge's decision or a Board order. Regions are also supplied with the various blue and white forms that set forth the basis of the posting. Foreign language notices may be posted in addition to notices in English. Translations may be made by bilingual agents/support staff or by a translation service. In addition, the Agency maintains an archive of foreign language notices in a variety of languages that are available for use by the Regions. See OM 03-86 for a list of common notice provisions in Spanish or contact the Division of Operations-Management regarding a list of archived notices available, as noted in OM 99-18.

10518.4 Respondent Effectuation of Posting

A responsible official of the respondent must sign and date notices before posting them, and submit two signed and dated copies of the notice to the Region, along with a certification of posting. The charging party is entitled, upon request, to a photocopy of the signed and dated notice. The certificate of posting must be completed to indicate the date and all locations of posting. In addition to this initial report, the respondent should be asked to report at the end of the posting period that the copies were continuously and conspicuously posted.

10518.5 Posting by a Union

When a union is a respondent, posting provisions generally require that the union return signed and dated notices to the Region to forward to the employer for voluntary posting at the employer's premises. The Region should obtain a sufficient number of signed notices and transmit them to the employer. In the event that respondent maintains a bulletin board at the facility of the employer where the unfair labor practice occurred,

[5] *Public Service of Oklahoma*, 334 NLRB 487 (2001).

the respondent shall also post notices on each such bulletin board during the posting period. In a hiring hall case, it may also be appropriate to require posting of the notice in the referral hall.

10518.6 Side Notices

The posting of a notice adjacent to a Board notice constitutes noncompliance with the posting provision if the side notice's language attempts to minimize the effect of the Board notice or where it suggests that respondent does not subscribe to any of the Board notice's statements. Posting of a settlement agreement form alongside the notice does not normally constitute noncompliance. However, such side notice posting is discouraged if the settlement agreement contains a nonadmissions clause (ULP Manual Section 10130.8) and may constitute noncompliance if the nonadmissions clause is highlighted, circled or otherwise emphasized.[6] Difficult and/or unusual issues involving side notices should be submitted to Advice.

10518.7 Routine Notice Checks

The charging party should be advised to bring to the attention of the Compliance Officer any problems associated with proper posting of notices. The Compliance Officer is responsible for investigating allegations of noncompliance with the posting requirements. That investigation may include an unannounced visit to the respondent's facility to inspect the posting. In addition, it is generally appropriate to make routine checks of posted notices when Board agents are in the neighborhood of the posting site in the course of other business. In order to avoid potential skip counsel rule issues, Board agents can only engage in limited ex parte contacts with a manager or supervisor at the respondent's facility for the purpose of locating and verifying a notice posting. The Board agent should exercise caution that he or she does not engage in any substantive conversation about the subject of the attorney's representation or any topic that in any way affects the underlying unfair labor practice. The Board agent should also be careful not to elicit or obtain any attorney-client privileged information. In the event the posting is inadequate or improper, communications about such issues should be with the attorney representing the respondent. See ULP Manual Section 10058.2.

10518.8 Possible Contempt for Refusal to Post Notices

Before recommending contempt for respondent's failure to post a notice, the Region should obtain proof, in the form of an affidavit from an eyewitness, who may be a Board agent, that no notice was posted or that the posting was deficient. In the alternative, a documented admission by the respondent of a failure to post should be provided.

10520 Notice Mailing

Most Board orders require the respondent to mail notices at its expense to current and certain former employees if the facility involved in the case has been closed during

[6] See, for example, *Bangor Plastics*, 156 NLRB 1165, 1166–1167 (1966), enf. denied 392 F.2d 772 (6th Cir. 1968); *Bingham-Williamette Co.*, 199 NLRB 1280, 1281–1282 (1972). Compare *St. James Mercy Hospital*, 307 NLRB 322, 324 (1992), where respondent's letter mailed to employees pointed out it entered into a settlement agreement without admitting it had committed unfair labor practices found not to constitute non-compliance, where respondent's letter was in response to false claims by the union that the Board had ruled against the respondent, and the letter was not posted with the notice.

the proceedings or if, in a refusal to hire case, the number of discriminatees exceeds the number of jobs available with the result that all discriminatees might not be able to see the notice posting. Many settlement agreements also include a notice mailing requirement in place of or in addition to the normal posting requirement. In situations where mailing is required, respondent is required to certify that it has complied with the notice mailing provisions by submitting a list of names and addresses of employees to whom it mailed notices and the date of mailing.

10522 Preserve and Make Available Records

When respondent has been ordered to make employees whole, there is usually a corresponding affirmative requirement that respondent make records available that are necessary to analyze the amount of backpay or other monetary remedy due. After preliminary investigation, the Compliance Officer may need to detail for respondent the nature of records required for the particular case, as respondent may not readily discern on its own the records most appropriate for determining backpay.

The Board requires respondents to promptly take action to comply with its orders. Respondents are expected to begin taking affirmative steps to comply within 14 days from the date of the order.[7] Similarly, the Board generally requires respondents "within 14 days of request" to provide copies or otherwise make available for review, all payroll and any other records necessary for the calculation of backpay.[8] Regions should request that these records be provided in both electronic and hard-copy formats. These time limits may be applied as a general rule; however, reasonable requests for an extension of time to provide records from an otherwise cooperative respondent should typically be granted. The failure to promptly make backpay records available should signal Regions to seek enforcement of the Board's order and to consider other means of obtaining records necessary for calculating backpay.

When a respondent refuses to make records available as required under a Board order, experience has shown that contempt proceedings, even when summary, aimed at procuring such records are unduly time consuming and cumbersome. A better approach is for the Region to subpoena the records from the respondent or others pursuant to Section 11 of the Act, assuming that the person to whom the request is made does not cooperate voluntarily.

For example, an outside payroll service may be a source of wage information and may be subject to a subpoena if respondent does not cooperate voluntarily. The respondent's outside accountants or auditors also may be a good source of such information. See Section 10618.1 regarding investigative subpoenas and applicable clearance requirements.

[7] *Indian Hills Care Center*, 321 NLRB 144 (1996).
[8] *Ferguson Electric Co.*, 345 NLRB 142 (2001).

10522.1 Report to the Regional Director on Compliance Steps Taken

Board orders generally require the respondent to submit to the Regional Director a report of steps taken to comply with other provisions of the order. Such reports should be requested in the course of compliance actions. Their contents depend upon other circumstances of the case.

10524 Reimbursement for Dues Deducted

When an employer is found to have deducted dues payments unlawfully, reimbursement to employees may be ordered by the Board. Reimbursements due are to be computed with reference to books and records of both employer and union.

10526 Compliance With a 10(k) Determination of Dispute

See Unfair Labor Practice Proceedings Manual Section 10214.

10528 Bargaining

10528.1 Overview

In cases where a respondent has violated Section 8(a)(5) or 8(b)(3) of the Act, a standard affirmative provision in a settlement agreement or Board order requires the respondent to bargain collectively, on request, over working conditions covering the employees in a described unit. Other bargaining provisions will address the circumstances of the case and may require such actions as to meet and bargain, to restore conditions that were unlawfully unilaterally changed, to provide requested information, or to reduce an agreement to writing. Most bargaining cases involve an employer respondent, but bargaining requirements in cases involving either an employer or union are generally equivalent. Some affirmative requirements will be self-explanatory, while others will require investigation and determination.

10528.2 Affirmative Requirements That Require Charging Party Request

Affirmative requirements involving bargaining often require respondent action only on the request of the charging party. When this is the case, the Compliance Officer should notify and remind the parties of this qualification in compliance requirements.

For example, a remedial provision of a Board order may require that, on the union's request, a respondent employer must reinstate terms of a collective-bargaining agreement that it unlawfully unilaterally changed when the agreement expired. The union must decide whether to request such a reinstatement and in some circumstances may conclude not to do so. For example, the parties may have bargained during the pendency of unfair labor practice proceedings and reached a complete new agreement. Only if the union requests reinstatement of the terms of the expired agreement is the employer required to reinstate them. The Region should not serve as a conduit for such requests; rather, the Region should satisfy itself that such a request has in fact been made.

When a charging party makes the appropriate request, compliance with the provision requires that the action be undertaken; the Compliance Officer must evaluate all that is entailed in the action. Where the charging party does not request specified respondent action because it has reached an agreement with the respondent, that

agreement may constitute compliance with the provision. Where there is neither an agreement nor a request to undertake a specified action, both parties should be aware that, absent special circumstances, the compliance obligation is continuing.

10528.3 Obligations to Recognize, Meet, and Bargain

In cases where a respondent has refused to meet and bargain as a result of its desire to test the certification of a union as the exclusive bargaining representative ("test of cert" cases), the Region should immediately contact the respondent and confirm whether respondent still intends to refuse to recognize and bargain with the union. Upon such confirmation or if respondent fails to respond to the Region's contacts, the Region should recommend enforcement proceedings be initiated no later than seven (7) days after issuance of the Board order. In cases where the respondent has refused to recognize or meet with the charging party and affirmative provisions require it to meet and to bargain upon request of the charging party, compliance should be monitored by periodic checks on the status of negotiations. Accurate and complete information about bargaining conferences and interparty communications should be obtained and kept in the Region file. The Region should exercise caution, however, that its function be confined to ensuring that bargaining takes place; it should not encourage specific bargaining positions or otherwise render assistance of a mediatory nature.

10528.4 Bargaining Obligations Monitored for a Reasonable Period of Time

The process of collective bargaining may be prolonged and compliance with affirmative bargaining provisions may be accomplished only over a long period of time. The point at which the Compliance Officer ceases to monitor bargaining will depend on the circumstances of the case. It is generally appropriate to cease monitoring and to close cases when a new agreement has been reached, when the parties have reached a good-faith impasse in negotiations for a new agreement, or when the charging party has established that it is no longer interested in pursuing bargaining.

10528.5 Make-Whole Benefit Funds

When a respondent has unlawfully unilaterally discontinued payments to benefit trust funds, it is typically ordered to make whole the union funds on behalf of employees possessing a nonspeculative future economic interest in those funds.[9] Retroactive payments to the funds can also be ordered without any offset for the cost of providing substitute benefits.[10]

On the other hand, if an individual's economic interest in the future viability of a union fund is merely speculative, contributions to that fund may not be ordered on the individual's behalf.[11] Examples of individuals who have a nonspeculative economic interest in the funds would include individuals who have obtained pension vesting rights, individuals who would have obtained vesting rights absent the unfair labor practice, or individuals who are currently employed by an employer that is contributing to the same funds.

[9] *Roman Iron Works*, 292 NLRB 1292, 1293 fn. 15 (1989) and *Ron Tirapelli Ford*, 304 NLRB 576 fn. 2 (1991).

[10] *Stone Board Yard*, 264 NLRB 981 (1983), enfd. 715 F.2d 441 (9th Cir. 1983), cert denied 466 U.S. 937 (1984).

[11] *1849 Sedgwick Realty LLC*, 337 NLRB 245 (2001); *Centra Inc.*, 314 NLRB 814, 819–820 (1994), enf. denied on other grounds 110 F.3d 63 (6th Cir. 1997); *Manhattan Eye, Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 157–160 (2d Cir. 1991); and *NLRB v. Transport Service Co.*, 973 F.2d 562, 569 fn. 3 (7th Cir. 1992).

To assess the liabilities to benefit trust funds in cases where it is determined that retroactive payments are required, the Compliance Officer must establish benefit contribution rates, the complement of unit employees, and the backpay period.

For example, a Board order requires retroactive contributions to a health and welfare fund as required under terms of a collective-bargaining agreement. The agreement establishes that the contribution rate is $1.50 for every hour worked. Employer payroll records will establish who the unit employees were and the number of hours they worked during the backpay period. With this information, the full liability will be determined by arithmetic. In cases involving large numbers of unit employees, spreadsheet programs greatly facilitate calculation of liabilities.

The Board has required payment of liquidated damages and/or interest on delinquent payments to union funds in cases where the language of the parties' collective-bargaining agreement and/or the funds' trust agreements allow for the payment of liquidated damages.[12] Information about the specific requirements set forth in the benefit plans should be solicited from the fund administrator early in the compliance investigation. The Region should ensure accurate interpretation of the plan's coverage and request the administrator to compute the liability due under the parameters of the plan. The Region should take the administrator's calculation into account in determining the amounts due.

In cases where respondents have unlawfully ceased making contributions to benefit funds, affirmative provisions of settlement agreements and Board orders also generally require that employees be made whole for losses resulting from the cessation of contributions. See Sections 10544.2 and 10544.3 for discussion of losses to individual employees resulting from lost health and retirement benefits. See Section 10552.4 for discussion of the treatment of interim health and retirement benefits in determining net employee losses.

10528.6 Disestablishment

Disestablishment contemplates a complete and permanent termination of all relationships between an employer and the affected labor organization, and any successor having to do with wages, hours, and other working conditions. It does not necessarily mean complete dissolution of the organization, although the order may bring about that result. Disestablishment is effected by the employer's written notification to the union, sent to the last known officers (if there is doubt as to present existence), that it withdraws recognition from or will not grant recognition to the union, whichever is appropriate, and disestablishes the union as bargaining representative for its employees.

The employer must also specifically notify employees that it has disestablished the union as bargaining representative for its employees and that they are free to join or not to join any other union. It must perform such other affirmative acts as may be required by the order, such as providing instructions to supervisors to withdraw from membership in the union or from participation in the union's affairs.

[12] See *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979), and *J.R.R. Realty Co.*, 301 NLRB 473, 475 fn. 16 (1991). See also *Ryan Iron Works*, 345 NLRB No. 56 (2005).

10530 Reinstatement

10530.1 Overview

When a respondent has unlawfully terminated an employee or taken other action to adversely change terms or conditions of employment, the standard Board remedy is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed. The underlying remedial principle is that the employee be restored to circumstances that existed prior to the respondent's unlawful action or that would be in effect had there been no unlawful action. The following sections address procedures and issues in effectuating reinstatement.

Remedial orders also generally require respondents to make whole employees for losses suffered as a result of an unlawful termination or adverse action. Sections 10536–10568 address procedures and issues in determining backpay required to make an employee whole. Section 10592.8 addresses settlement procedures pertaining to reinstatement issues.

10530.2 Reinstatement to Former Position

When the former position is well defined and still exists at the time reinstatement is offered, the respondent should offer the employee reinstatement to that position.[13] Reinstatement is not foreclosed because the position has been filled since the unlawful action or because a replacement employee will have to be displaced in order to effectuate reinstatement. Contentions that reinstatement would be disruptive or adversely affect morale do not serve to preclude reinstatement.[14]

Full reinstatement also requires restoration of seniority[15] and other benefits and privileges,[16] restoring the employee's status to what it would have been had there been no interruption of employment by the unlawful action.

For example, 2 years after an employee has been terminated, a Board order issues requiring that the employee be offered full reinstatement to the employee's former position. Full reinstatement requires not only placement in the employee's former position, but also credit for seniority for the 2-year period between the termination and reinstatement. Restoration of seniority and other privileges can affect future vacation accrual, credit toward retirement, standing in the event of a layoff, and other terms of employment. Full reinstatement also requires reinstatement at terms that would be in effect at the time of the reinstatement offer had there been no unlawful action, including pay raises and changes in benefits.[17] If the employee would have been promoted or transferred during the period between the unlawful action and the reinstatement offer, reinstatement should be to the position to which the employee would have been promoted or transferred, at terms applicable to the new position.[18]

[13] See, for example, *Chase National Bank*, 65 NLRB 827, 829 (1946); and *Panoramic Industries*, 267 NLRB 32, 38–39 (1983).
[14] See, for example, *Fry Products*, 110 NLRB 1000 (1954).
[15] See, for example, *Rainbow Coaches*, 280 NLRB 166, 184 (1986).
[16] See, for example, *Staats & Staats, Inc.*, 254 NLRB 888, 899 (1981).
[17] See, for example, *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159 (1980).
[18] See, for example, *Mooney Aircraft*, 164 NLRB 1102, 1103 (1967).

It is the Compliance Officer's responsibility to investigate what is required to effectuate full reinstatement and to establish what terms are in effect at the time of reinstatement. The employer's established practices and the experience of other employees in similar jobs should provide a basis for determining full reinstatement requirements.

10530.3 Reinstatement to a Substantially Equivalent Position

In the event that the employee's former position no longer exists at the time reinstatement is offered, the standard reinstatement provision in a Board order requires reinstatement to a substantially equivalent position.[19] In this situation, it is the Compliance Officer's responsibility to investigate the circumstances of the elimination of the former position and what treatment the employer would have accorded the employee in the absence of the unlawful action.

In construction industry cases, reinstatement rights may expire with the completion of work at the jobsite where the unfair labor practice occurred. The Board generally reserves for compliance the decision as to whether employment would have continued beyond the end of work at a given jobsite. The Compliance Officer's investigation in such cases should focus on whether, absent the unfair labor practice, discriminatees would have been laid off at the end of the job, or in the alternative, would have remained employees of the Respondent and been transferred to other jobs following completion of work at the jobsite in question.

10530.4 Reinstatement Rights of Strikers

Employees engaged in strikes have certain reinstatement rights on their unconditional application to return to work.

Unfair Labor Practice Strike

Unfair labor practice strikers are entitled to full reinstatement on unconditional application, even if the employer must dismiss other employees hired to replace them during the unfair labor practice strike.[20]

Generally, the Board will order the respondent to reinstate unfair labor practice strikers on application and to make them whole for any loss of pay resulting from the failure to reinstate them within 5 days after their application.[21] If the employer rejects, unduly delays, or ignores any unconditional application to return to work or attaches unlawful conditions to reinstatement, backpay will commence as of the date of the unconditional application to return to work.[22]

An employer's valid offer of reinstatement to some but less than all of a group of unfair labor practice strikers will toll backpay for those to whom the offer is made. They do not lose their rights to reinstatement if they refuse the offer because it was not made to the entire group.[23]

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[19] See, for example, *Chase National Bank*, 65 NLRB 827, 829 (1946).

[20] See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 fn. 9 (1956), affg. 214 F.2d 462, 466 (2d Cir. 1954), enfg. 103 NLRB 511, 518–519, 562 (1953).

[21] See, for example, *Drug Package Co.*, 228 NLRB 108, 113–114 (1977), enfd. in part and remanded in part 570 F.2d 1340 (8th Cir. 1978).

[22] See, for example, *Drug Package Co.*, 241 NLRB 330, 332 fn. 13 (1979).

[23] See, for example, *Southwestern Pipe*, 179 NLRB 364, 365 (1969), modified on other grounds 444 F.2d 340 (5th Cir. 1971).

Economic Strike

Economic strikers are entitled to full reinstatement upon unconditional application if their jobs are available or, if such are not available, reinstatement to substantially equivalent positions.[24] Economic strikers are also to be made whole for losses resulting from a refusal or delay in reinstatement.

If, at the time of the economic strikers' application for reinstatement, their jobs are held by permanent replacements, the employer need not discharge the replacements to make room for the strikers.[25] Moreover, if vacancies are not available because of substantial business reasons (such as a business downturn), the respondent need not immediately reinstate strikers.[26]

Although an employer need not offer immediate reinstatement to economic strikers if no positions are available at the time they offer to return to work, if vacancies later arise, the employer must seek out the strikers and offer them reinstatement, unless they have obtained regular and substantially equivalent employment elsewhere, or unless the employer can show legitimate and substantial business justification for failing to offer such reinstatement.[27]

The requirement of unconditional application can be satisfied by an application by the union, acting as the strikers' agent, on behalf of all strikers; individual applications by the strikers are not necessary.[28] Similarly, an employer's offer of reinstatement to the strikers as a group may be adequate if made to the union representing the strikers.[29]

10530.5 Withdrawal From Labor Market No Bar to Reinstatement

A discriminatee's withdrawal from the labor market does not normally terminate the employer's obligation to reinstate.[30]

See Section 10560 regarding actions that constitute unavailability for employment and withdrawal from the labor market. Such actions, although not ending the employer's reinstatement obligation, do affect backpay.

10530.6 Reinstatement When a Union is the Respondent

When a union has unlawfully caused an employee to be terminated, it may not be in a position to effectuate reinstatement. Reinstatement provisions in Board orders against union respondents often require specific union actions to seek reinstatement by

[24] See, for example, *Laidlaw Corp.*, 171 NLRB 1366, 1367–1370 (1968), enfd. 414 F.2d 99, 103–106 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[25] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 335 (1938), reaffd. in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). It is the employer's burden to establish that strike replacements are permanent rather than temporary. See *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991) (the employer must show a mutual understanding between itself and the replacements that they are permanent). The determination of the replacement date turns on if and when a commitment to hire an employee for a permanent job was made and accepted, irrespective of when the individual actually starts working or whether the individual has completed any posthire tests or a probationary period. See *Solar Turbines*, 302 NLRB 14 (1991); and compare *Harvey Mfg.*, 309 NLRB 465 (1992).

[26] See, for example, *Robinson Freight Lines*, 129 NLRB 1040, 1041 (1960), enfd. 289 F.2d 937 (6th Cir. 1961); and *Oregon Steel Mills*, 291 NLRB 185, 191–192 (1988), enfd. 134 LRRM 2432 (9th Cir. 1989), cert. denied 110 S.Ct. 2617 (1990).

[27] See, for example, *Laidlaw Corp.*, supra; *Harvey Engineering & Mfg. Corp.*, 270 NLRB 1290, 1292 (1984).

[28] See, for example, *Ekco Products Co.*, 117 NLRB 137, 147–148 (1957), and *Colonial Haven Nursing Home*, 218 NLRB 1007, 1011 (1975).

[29] See, for example, *Birmingham Ornamental Iron Co.*, 251 NLRB 814 fn. 1 (1980).

[30] See, for example, *Deena Artware*, 112 NLRB 371, 376 (1955), enfd. 228 F.2d 871 (6th Cir. 1955).

the employer, such as notifying the employer that it no longer has objections to the employment of the employee.[31]

See Section 10546 regarding backpay when a union is the respondent.

10530.7 Unresolved Reinstatement Issues; Potential Contempt Issues

In those cases where the amount of backpay may depend on whether there has been proper reinstatement, and when an enforced Board order requires reinstatement, the Region should submit the matter to the Contempt Litigation & Compliance Branch (copy to the Division of Operations-Management), with a recommendation as to whether contempt proceedings are warranted. The case should be submitted even where there appears to be a legitimate factual or legal controversy surrounding the reinstatement. When the facts clearly show insufficient basis for initiating contempt proceedings, telephonic consultation suffices.

Where a case has been submitted to the Contempt Litigation & Compliance Branch, the Region should continue to conduct whatever investigation is necessary to compute backpay and to prepare a compliance specification. Unless otherwise instructed by Contempt, the Region should defer issuance of a compliance specification until the General Counsel has decided to recommend, or the Board has decided whether to authorize, contempt proceedings.

10532 Exceptions to Reinstatement

10532.1 Overview

Standard reinstatement provisions are clear on their face. There are, however, situations in which reinstatement is not appropriate and is instead precluded. Where respondent contends that reinstatement is not appropriate, it is the responsibility of the Compliance Officer to investigate the situation and recommend a Regional determination.

When it is determined that reinstatement is precluded, backpay is tolled as of the date it was foreclosed. Section 10536.2.

The following sections address situations in which reinstatement might be precluded.

10532.2 No Positions Available for Reinstatement

If there has been a major reduction in the employee complement, the general reinstatement obligation may be precluded if it is established that the employee would have lost his or her position in the course of events in the absence of any unlawful action.

For example, during the course of unfair labor practice proceedings concerning an employee termination, the employer closed its plant, laid off all employees and went out of business. The Board ultimately found the termination to have been unlawful and ordered reinstatement for the employee. The compliance investigation established that the employee would have lost his or her position at the time of the plant closing and the

[31] See, for example, *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773, 774 (1981).

Region determined that reinstatement was not required in order to comply with the Board order.

In situations where reinstatement is not required because of the elimination of any position to which reinstatement would be appropriate, reinstatement provisions of a Board order still require restoring the employee to conditions that would have applied had there been no unfair action.

For example, if the employee, absent the unlawful action, would have recall rights from a layoff, transfer rights to other employer facilities, or preference in future hiring, appropriate employer action should be required. In such situations, it may be appropriate for the Compliance Officer to periodically confirm that the respondent is following recall or preferential hiring policies.

At times, the Board order may provide specifically that an employee be placed on a preferential hiring list.[32]

In cases in which reinstatement is ordered for several employees and there are insufficient positions for all, the same principle of restoring what would have happened should be applied to determine which of the discriminatees should be reinstated to available positions and what arrangements should be made for the rest.

In a refusal-to-hire case where the Board has ordered instatement to the applicants and the number of applicants exceeds the number of available jobs, a compliance proceeding may be used to determine which of the applicants would have been hired for the openings and are entitled to instatement and backpay. The applicants who are in the group that exceed the number of openings would be entitled to a refusal-to-consider remedy. The respondent would have to consider them for future openings in accord with nondiscriminatory criteria.[33]

10532.3 Employee Disqualification

Respondent may contend that a discriminatee is no longer suitable for a job for such reasons as ill health, lack of skill, new equipment, or change of job content, and that reinstatement should be precluded.

In such situations, the Compliance Officer should investigate the nature of the changed circumstances and the established employer policies, and should seek to determine what would have happened to the employee in the absence of any unlawful action. The respondent bears the burden of showing that reinstatement is not appropriate under the circumstances presented. This burden cannot be met with speculation or statements that are not factually supported.[34]

The Board has also found that if the discriminatee's duties were limited by physical disability before the unlawful action, reinstatement must be to a position suitable to his or her physical limitations.[35]

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[32] See, for example, *Venezia Bread Co.*, 147 NLRB 1048 (1964).
[33] See *FES*, 331 NLRB 9, 14 (2000).
[34] See, for example, *Contemporary Guidance Services*, 300 NLRB 556, 558–560 (1990).
[35] *Lipman Bros.*, 147 NLRB 1342, 1347 (1964), enfd. 355 F.2d 15 (1st Cir. 1966). See, for example, *Oil Workers (Kansas Refined) v. NLRB*, 547 F.2d 575, 590 (D.C. Cir. 1976).

It may be appropriate to require a trial period at a job in which changes have been made since the unlawful action. If the trial period ends unsatisfactorily for the employee and a complaint is made that the employee was not given a fair trial, further investigation is warranted to determine whether the employee received support and training equivalent to other similarly situated employees.

Should the Compliance Officer feel it would be of assistance, he or she should consult with trade school specialists, union officials with long experience in the industry, the Apprenticeship Bureau of the Department of Labor, the State Unemployment Commission or Industrial Commission, or similar authorities in the field. Careful investigation by the Compliance Officer may disclose that the relevant evidence refutes the contentions and that the employee should be afforded further training or transfer to an available job for which that individual is qualified, as may be necessary.

Even where an employee is determined to no longer be qualified for his or her former position, reinstatement to another position may be required. Such a determination, again, depends on employer policies and the principle that the employee should be treated as though no unlawful action had occurred.

10532.4 Employee Actions That Preclude Reinstatement

Employee misconduct can preclude a respondent's reinstatement obligation.[36] Employee actions that result in loss of certification or qualification for a position may also preclude reinstatement.[37]

For example, if an unlawfully fired truckdriver lost his driver's license as result of a driving infraction during the course of unfair labor practice proceedings, reinstatement to a driving position may be precluded.[38] Reinstatement may be warranted to another position if that would be consistent with respondent's policies.

In such situations, the respondent bears the burden of establishing that reinstatement is inappropriate. The Board has evaluated employee misconduct in the context of unfair labor practices[39] and underlying respondent motive.[40]

10532.5 Undocumented Workers

When an employer's obligation to reinstate an employee conflicts with requirements of the Immigration Reform and Control Act of 1986, reinstatement may be precluded.[41] See Section 10560.7 for discussion of Agency policies under IRCA as they affect both backpay and reinstatement.

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[36] See, for example, *Clear Pine Mouldings*, 268 NLRB 1044 (1984). See also *John Cuneo, Inc.*, 298 NLRB 856 (1990) (misrepresentations on employment application form). See also *ABF Freight System v. NLRB*, 510 U.S. 317 (1994), where the Court upheld the Board's reinstatement order even where the discriminatee was found to have "lied" before the ALJ. For example, *Keeshin Charter Service*, 250 NLRB 780 (1980).

[37] See, for example, *Keeshin Charter Service*, 250 NLRB 780 (1980).

[38] See *DeJana Industries*, 305 NLRB 845 (1991) (reinstatement with backpay awarded if employee could obtain license in a reasonable period of time).

[39] See, for example, *Precision Window Mfg.*, 303 NLRB 946 (1991).

[40] See, for example, *Viele & Sons, Inc.*, 227 NLRB 1940 (1977).

[41] *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002).

10534 Reinstatement Offers

10534.1 Overview

An employer's obligation to reinstate under provisions of a settlement agreement or Board order is met when it has made a valid reinstatement offer.

Employee rejection of a valid reinstatement offer not only ends employer reinstatement obligations, but also ends the backpay period. Section 10536.2.

The following sections address issues concerning the validity of an employer reinstatement offer and employee obligations in accepting an offer.

10534.2 Validity of Offer

In general, reinstatement offers must be for full reinstatement to former conditions, or to conditions that would be in effect had there never been an unlawful action. Reinstatement offers that qualify or limit full reinstatement in any way may not be valid, and thus may not serve either to meet the reinstatement requirement of a settlement agreement or a Board order nor to end the backpay period.

To avoid misunderstanding, the Compliance Officer should advise employers to make offers of reinstatement in writing. Such offers should be in English and, if appropriate, in the language customarily used by the employer to communicate with the discriminatee.[42] Similarly, discriminatees should be advised to respond to the offer in writing. Employers should be advised that they should communicate a reinstatement offer directly to the discriminatee or his/her representative. An offer of reinstatement made directly to an employee's representative is valid as long as the other requirements of a valid offer are met.[43] Offers made to Agency personnel are not valid offers.

It is the responsibility of the Compliance Officer to investigate contentions that a reinstatement offer constitutes less than full reinstatement. This investigation will require review of established employer policies in relevant areas, such as seniority, transfer, and layoff. Determination of the validity of the offer will depend on applying the principle that the employee is to be reinstated to conditions that would exist in the absence of the unlawful action.

A discriminatee may refuse an inadequate offer of reinstatement without waiving the right to reinstatement.[44]

When the adequacy of the offer is disputed, and its determination is close or subject to compliance proceedings, the Compliance Officer should advise both the employer and the employee that a reinstatement offer ultimately found to be inadequate will not end the backpay period nor meet the employer's reinstatement obligation.

An offer ultimately found valid will have ended the backpay period, will have met the employer's reinstatement obligation even if rejected by the employee, and thus will not have to be made again by the employer at the time of the ultimate determination.

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[42] *Sure-Tan, Inc.*, 277 NLRB 302 (1985).
[43] *Sun World, Inc.*, 282 NLRB 785, 788 fn. 4 (1987).
[44] See, for example, *Holo-Krome Co.*, 302 NLRB 452, 454 (1991).

It may be appropriate to point out to the employee that it would be prudent to accept an offer, pending disposition of a dispute over its validity. Ultimate disposition could include additional backpay (if reinstatement was at inadequate wages) and restoration of additional conditions.

10534.3 Reinstatement Offered Conditioned on Further Unfair Labor Practice Proceedings

An otherwise valid reinstatement offer that advises the employee that the employer is still asserting the lawfulness of its past action against the employee in pending unfair labor practice proceedings is valid. An otherwise valid reinstatement offer made without payment of backpay is also valid.[45] An employee who rejects such an offer will not be entitled to a future offer, and the backpay period will end.

When reinstatement offers are made with such conditions, unfair labor practice proceedings will continue, as will compliance proceedings to obtain backpay through the end of the backpay period.

An offer that is conditioned on the employee withdrawing unfair labor practice charges or waiving backpay is not a valid offer.[46]

10534.4 Period for Acceptance of Offer

A valid reinstatement offer must give the employee a reasonable period to accept and report to work. There are no hard-and-fast deadlines for accepting a reinstatement offer and what constitutes a reasonable period depends on the circumstances of both employer and employee.

During the period between the unlawful action and the reinstatement offer, an employee may obligate himself or herself to activities that cannot be terminated immediately. The employee must be given adequate time to disengage himself or herself before being required to accept reinstatement or abandon reinstatement rights.[47]

If an otherwise valid reinstatement offer states an unreasonable reporting date, the employee may still have an obligation to respond, and inquire as to the employer's flexibility concerning the actual return date. Failure to respond may stop the running of backpay.[48] A reinstatement offer may be invalid if it makes clear that it will lapse if the employee does not report by an unreasonable date.[49]

An employee may not require the employer to hold an offer of reinstatement open indefinitely.[50] In situations where the employee is not immediately available to accept a reinstatement offer, a determination of the reasonable period to apply should take into account the employer's established practices.

For example, if an employee is pregnant and near term at the time she is offered reinstatement, the amount of time until she is required to return to work should be

[45] See, for example, *Consolidated Freightways*, 253 NLRB 988 (1981), on remand on other grounds 669 F.2d 790 (D.C. Cir. 1981), reported 290 NLRB 771 (1988), enfd. 892 F.2d 1052 (D.C. Cir. 1989).
[46] See, for example, *Adscon, Inc.*, 290 NLRB 501, 502 (1988).
[47] See, for example, *L. A. Water Treatment*, 263 NLRB 244, 246 (1982).
[48] See, for example, *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988).
[49] See, for example, *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 fn. 2 (1990).
[50] See, for example, *Tennessee-Carolina Transportation*, 108 NLRB 1369, 1371 (1954), remanded on other grounds 226 F.2d 743 (6th Cir. 1955).

consistent with the employer's established policies regarding maternity leave, as well as provisions of the Family and Medical Leave Act of 1993.

The inability of an employee to accept a reinstatement offer because of illness does not relieve the employer of its reinstatement obligation.[51] The employee, however, must contact the employer and inform the employer of the illness.

10534.5 Reinstatement Offered to an Employee Engaged in a Strike

If an employee who has been unlawfully terminated is participating in a strike at the time the employer offers him or her reinstatement, the employee is not required to abandon the strike in response to an offer of reinstatement. If the employee continues participating in the strike, however, his or her reinstatement rights become those of an employee participating in a strike. Section 10530.4.

A reinstatement offer to a striking employee should also end the backpay period. A new backpay period may begin after the striking employee makes an unconditional offer to return to work.

10534.6 Employee in the Armed Forces

When an employee who is required to be reinstated is in the Armed Forces, the employer's offer of reinstatement should be in the form of a letter, with a copy to the Region, advising the employee that he or she is being offered full reinstatement to his or her former or substantially equivalent position upon notifying the employer of acceptance within 90 days after discharge from the service, or from hospitalization continuing after discharge for a period of not more than 1 year.

The 90-day period (1 year if hospitalized) is intended to provide the employee with the protection of the Veterans Reemployment Rights Statute, Title 38 U.S. Code, Chapter 43, Sections 4321–4327.[52]

The Compliance Officer should inform the employee of the order as it applies to him or her and instruct the employee to notify the Region as to his or her whereabouts. After discharge from the Armed Forces or hospitalization and on timely notification thereof to the employer, the employee's right to reinstatement will be governed by general reinstatement principles.

10534.7 Missing Employees

If an employer makes a reasonable effort to communicate a reinstatement offer to an employee, but is unable to locate the employee, the backpay period may be suspended. Section 10562.3. However, the failed effort does not end the employer's reinstatement obligation and the Board may later require reinstatement as part of its order;[53] if the employer is later advised of the employee's availability for work, the employer may be required to offer.[54]

See Section 10584 regarding the extinguishment of remedial obligations to employees who remain missing after compliance is otherwise effectuated.

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[51] See, for example, *NLRB v. Mooney Aircraft*, 61 LRRM 2164, 2165–2166 (5th Cir. 1966), contempt proceeding on order in 138 NLRB 1331, 1333 (1962), enfd. 328 F.2d 426 (5th Cir. 1964).

[52] See, for example, *Diversified Case Co.*, 263 NLRB 873, 875 fn. 8 (1982).

[53] *Burnup & Sims, Inc.*, 256 NLRB 965 (1981).

10534.8 Waiver or Rejection of Reinstatement Offer

If an employee declines a valid reinstatement offer, the employer's reinstatement obligation is ended. There is no obligation to make the offer again.

A valid reinstatement offer ends the backpay period, but does not meet the requirements of backpay provisions of a settlement agreement or Board order. That is, backpay must still be paid for the period between the unlawful action and the reinstatement offer.

Statements made by an employee during the course of unfair labor practice proceedings that purport to waive or decline the right to reinstatement, do not end the backpay period or serve to relieve the employer of its obligations under reinstatement provisions of a settlement agreement or Board order that results from the proceedings.[55]

10536 Backpay

10536.1 Overview

Backpay is the standard Board remedy whenever a violation of the Act has resulted in a loss of employment or earnings. Losses can result not only from terminations in 8(a)(3) cases, but also from unlawful actions in 8(a)(1), (4), or (5) cases, as well as in 8(b)(1)(A) or (2) cases.

The goal in determining backpay is the same in all cases. The Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred. Backpay awards are intended to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation. Backpay awards do not include punitive damages but may include compensable damages, such as the loss of a car or house due to the discriminatee's inability to make monthly payments as a result of being unlawfully laid off or terminated. Situations involving compensatory damage issues should be submitted to the Division of Advice. See OM 99-79.

Backpay awards also effectuate the purposes of the Act by discouraging respondents from further unfair labor practices and by assuring discriminatees that the Government is protecting their rights under the Act.

The basic method of determining backpay is the same in all cases. Backpay is based first on the earnings a discriminatee would have had but for the unlawful action. Against this gross amount is offset the discriminatee's actual earnings from other employment that took place after the unlawful action, less the necessary expenses incurred by the discriminatee in seeking and holding interim employment. Under some circumstances, the amounts that would have been earned had the discriminatee not quit, been discharged from, or refused interim employment are deducted from gross backpay. The difference is the net backpay award. Backpay also includes other compensation, such as benefits, lost as a result of the unlawful action, and is adjusted for in any net backpay award.

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[54] *Jay Co.*, 103 NLRB 1645 (1953).

[55] See, for example, *Heinrich Motors*, 166 NLRB 783, 785 (1967), enfd. 403 F.2d 145, 149 (2d Cir. 1968); *Lyman Steel Co.*, 246 NLRB 712, 714 (1979); and *Big Three Industrial Gas*, 263 NLRB 1189, 1203 (1982).

10536.2 Definition of Backpay Terms

Discriminatee and or Claimant: An employee, member, or applicant for employment who suffers economic losses as a result of an action unlawful under the Act.

Backpay Period: The period during which backpay liability accrues, beginning when the unlawful action took place and ending when a valid offer of reinstatement is made or when the backpay period has been tolled for other valid reasons (for example, closure of the facility; evidence that discriminatee would have been laid off during the backpay period notwithstanding the unfair labor practice; or death of the discriminatee) or when conditions in effect prior to the unlawful action have been restored.

Gross Backpay: What the discriminatee would have earned from respondent had there been no unlawful action. Earnings include not just wages, but all other forms of compensation such as vacation pay, health and retirement benefits, bonus payments, and use of vehicles.

Interim Earnings: Earnings of the discriminatee from other employment obtained during the backpay period.

Expenses: Necessary expenses incurred by the discriminatee in seeking and holding interim employment that he or she would not have otherwise incurred are offset against quarterly interim earnings, such as stamps, mileage for job interviews, etc. In quarters in which there are no interim earnings, the discriminatee is not entitled to reimbursement for expenses.

Net Backpay: The amount owed a discriminatee by respondent. Net backpay is generally gross backpay minus interim earnings, but may be adjusted by discriminatee expenses, other gross compensation not subject to offsetting interim earnings, and periods during the backpay period in which the discriminatee was unavailable for employment or failed to seek interim employment.

10536.3 Compliance Responsibilities

The Region is responsible for determining net backpay due in all cases. To do so, information and supporting records should be obtained from both respondent and the discriminatees. Although it is important to elicit the cooperation of all parties in providing information and various forms of assistance should be accepted, the Region should not rely wholly on the parties to determine any component of backpay. Further, although settlement of backpay should be encouraged, the Region should also retain the initiative, address all issues and obtain all information required to make a backpay determination.

10536.4 Initiation of the Backpay Investigation

Determination of backpay should begin as soon as the Region determines that an unfair labor practice charge has merit and that backpay is among the appropriate remedies. Such a determination will support immediate settlement efforts. It will inform respondents of potential future liabilities in the absence of settlement and provide an opportunity to inform discriminatees of their responsibility to seek interim employment and maintain records of interim earnings. Finally, it will facilitate and expedite the

formal determination of backpay that may be necessary should the case result in a Board order or judgment.

Section 10508 discusses points during the course of unfair labor practice proceedings when initiation of compliance action is appropriate.

10538 Backpay Investigation Procedures

Appropriate steps in investigating and determining backpay include identifying and discussing backpay issues with all parties; obtaining information and supporting records regarding wage rates, work schedules, available overtime, promotions, or other conditions relevant to determining gross backpay; obtaining information and appropriate documentation from discriminatees regarding interim earnings and availability for work; evaluating information to determine a reasonable gross backpay formula and gross backpay amounts; preparing net backpay estimates; initiating settlement negotiations; and, where necessary, formally determining backpay.

10538.1 Review of Case Record and Background

Information gathered and facts established during unfair labor practice proceedings and related representation cases should be reviewed and used as a basis for the backpay investigation. Affidavits, file memos, correspondence, position statements and other documents including, for example, exhibits made part of the record in the unfair labor practice hearing or in a related representation case may provide information on wage rates, work assignments, unit employees, significant dates, and other important information. The administrative law judge decision and Board order may also establish certain facts, such as the date of a discharge or unlawful action, on which the backpay determination must be based.

10538.2 Discussion With the Parties

The investigation of gross backpay may begin by asking respondent, charging party, and the discriminatee how they think gross backpay should be determined and how much it should be. Both may be familiar with rates and methods of compensation, identity of comparable or replacement employees and other issues that will be addressed to determine gross backpay.

When eliciting information and positions, the Compliance Officer must impress on the parties that the Region is ultimately responsible for determining backpay and other compliance issues.

In less complex cases and where all parties agree on relevant facts, gross backpay, as well as other backpay issues, may be determined based on representations of the parties. In cases where parties disagree on facts or where not all parties have access to full information, it will be necessary to obtain documentation to support representations.

10538.3 Relevant Records

In cases where documentation or records are required, they should be requested and obtained as soon as possible. In most cases, the employer's records will be the principal source of information on which to base a gross backpay determination. Board orders normally include a provision requiring respondents to preserve and make available

records needed by the Region for determining backpay. When necessary, there are other records that can be used for documenting employment or earnings. Keep in mind that many employer and union records may be maintained in electronic form. The Compliance Officer should request that records be provided in electronic form, as well as hard copy, particularly when the records are complex or voluminous. Records provided in spreadsheet form, which can be easily sorted and otherwise arranged aid in analyzing the data and constructing a backpay formula. The Contempt Litigation & Compliance Branch or the Office of Chief Information Officer can provide assistance if parties' electronic records are not compatible with agency software.

Main sources of information include the following:

- Timecards and work schedules are often maintained as a basis for payroll records.

- Personnel files often contain such information as hire and termination dates, transfers, job classification, and wage rate changes, as well as information useful in locating missing discriminatees or other witnesses.

- Payroll records. Even small employers now often use electronic payroll services which summarize earnings in various useful ways.

- Tax records can provide earnings documentation. Employers must issue employees a W-2 statement of annual earnings by the end of January for the previous year's earnings. Employers in most states must also file a quarterly payroll statement for unemployment tax purposes that states gross employee earnings.

- State employment department records. Most state unemployment departments maintain records of past employment and earnings, as entitlement for unemployment benefits is based on past employment. In some states, the departments may provide this information to the Region upon request.

- The Social Security Administration will provide reports on earnings that can document employee earnings subject to some limitations. SSA reports generally do not show earnings for the most recent period, show earnings only on an annual basis, and may not show earnings above FICA tax limits. To provide earnings information, the Social Security Administration requires submission of Form SSA-581. This form requires the Region to obtain the written authorization of the person whose earnings records are requested, as well as that person's social security number. The Region may specify the period of time for which records are being sought. Since obtaining the written authorization on SSA-581 and then awaiting a response from the Social Security Administration may be time consuming, Regions may wish to procure executed SSA-581s as early as possible in the handling of the case. All Form SSA-581s should be mailed to the Social Security Administration at:

Social Security Administration
Attention: DERO
300 N. Greene Street
Baltimore, Maryland 21290-0300

- Union records, such as hiring hall dispatch records or records of dues received when assessed on the basis of hours worked, may provide documentation of employment dates and hours.
- Trust fund records of employer contributions and employee credit hours may also provide information regarding hours of employment.

10538.4 Evaluation of Information

When information has been obtained, it must be evaluated to determine a reasonable method of measuring gross backpay, actual earnings rates to apply to that method, and proper interim earnings offsets to determine net backpay.

10540 Gross Backpay

10540.1 Overview

The objective in determining gross backpay is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period, had there not been an unlawful action.

Gross backpay must take into account all benefits and forms of compensation that a discriminatee would have earned from employment, had there not been an unlawful action. All forms of wages, including overtime, premiums, tips, bonus payments, and commissions, are to be considered in determining gross backpay. Health insurance, contributions to retirement plans, meal allowances, employer-provided cars or housing or any other benefit of employment must also be considered.

Gross backpay must also be based on changes in wage rates or other compensation that take place during the backpay period.

The determination of gross backpay is not based on an unattainable standard of certainty. Rather, gross backpay must merely be based on a reasonable method and reasonable factual conclusions. It should be easy to understand and to apply. Over the years, the Board and the courts have applied this broad standard of reasonableness to approve numerous methods of calculating gross backpay.[56]

All changes from the status quo at the time of the unlawful action are significant in selecting a gross backpay formula. A comparison of the company's records before the unfair labor practices with those during the backpay period should disclose changes in pay and hours, periods of high and low employment and earnings, shutdowns, department changes, and bonus payments. Based on analysis of records obtained and the background of the case, a tentative formula should be selected. The records should then be reviewed to make sure they contain sufficient data to enable the ready preparation of a computation in accordance with the formula selected.

[56] See, for example, *Am-Del-Co, Inc.*, 234 NLRB 1040, 1042 (1978).

If the case is complex, it is advisable to test the formula in a sample computation. This will disclose deficiencies before too much time is invested in the computation.

In cases involving many backpay claimants and long backpay periods, if the Region has reason to believe that backpay issues can be resolved without a formal proceeding, an estimate of backpay may be prepared to serve as a basis for settlement. Section 10592.5. In simpler cases, when computations can be speedily prepared, estimates should be avoided.

The method selected for calculating gross backpay must depend on the facts and circumstances of the particular case. Although there is no fixed method for calculating gross backpay, there are three basic methods by which it may usually be measured and which should be considered in devising a reasonable method in a particular case. These three methods are:

- **Formula One**: The average hours and/or earnings of the discriminatee prior to the unlawful action.
- **Formula Two**: The hours and/or earnings of comparable employees.
- **Formula Three**: The hours and/or earnings of replacement employees.

10540.2 Formula One: The Average Hours and/or Earnings of the Discriminatee Prior to the Unlawful Action

Using this method, gross backpay is a projection through the backpay period of the discriminatee's average hours and/or earnings from an appropriate period prior to the unlawful action.

For example, if a discriminatee earned an average of $400 per week for the 6-month period prior to his unlawful termination, under this method, gross backpay would simply be $400 per week, or $5200 in a 13-week calendar quarter, for the duration of the backpay period. If the discriminatee worked an average of 40 hours per week prior to the unlawful action, gross backpay would be calculated by multiplying wage rates in effect during the backpay period by 40 hours per week.

Criteria for adopting this method: This method is applicable when it is concluded that conditions that existed prior to the unlawful action would have continued unchanged during the backpay period. It has the advantage of being easily understood and applied. Projection of average earnings is a reasonable method when discriminatee earnings varied from day-to-day or even week-to-week, but were consistent over a longer period of time. Records of earnings from the period prior to the unlawful action should also be readily obtainable through employer payroll records, tax reports, or other sources described in Section 10538.3. The following circumstances should be considered in deciding whether this method is appropriate in a given case:

- The discriminatee must have been employed long enough prior to the unlawful action to establish a reliable record of average earnings. If the discriminatee did not have sufficient employment to establish a consistent record or if earnings were not consistent—for example, if the discriminatee was employed in a seasonal industry—this method would not be appropriate.

- Even where earnings were generally consistent, care should be taken not to calculate an average using extraordinary variations from normal earnings or schedules. For example, if normal earnings were temporarily affected by a nonrecurring event, such as an accident or a crisis requiring extra overtime, it would generally be most reasonable to exclude the extraordinary period from the calculation of the average.
- Conditions must not have changed during the backpay period. If there were significant changes in the availability of work, methods of compensation or in anything else that would affect hours of work or earnings, other methods may be more appropriate.
- If basic work schedules did not change during the backpay period, but wage rates did, this method might be appropriate, with gross backpay calculated on the basis of a projection of the discriminatee's average work schedule from the period prior to the unlawful action and wage rates that would have been in effect during the backpay period.
- In general, this method is most applicable to a short backpay period. As the backpay period becomes longer, it becomes more likely that significant changes in conditions will occur.

Sample computation of gross backpay based on a projection of average weekly earnings: A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on January 8, 2005. The backpay period ended on July 14, 2005, when the discriminatee declined an offer of reinstatement. All parties agreed that no wage increases were granted and no significant changes in work schedules took place during the backpay period. All agreed that a projection of the discriminatee's average earnings from the period prior to her termination would be a reasonable basis on which to determine gross backpay. Respondent payroll records were examined to determine average earnings during the period preceding the termination. They showed that work schedules and earnings vary from week-to-week. The weeks of November 4, 11, and 18, as well as the weeks of December 2, 9, and 16, all appeared to be normal workweeks, for both the discriminatee and similarly placed employees.

The week of November 25 appeared to be a short week for most employees, as were the weeks of December 23 and 30. All parties agreed that work is slow during holiday periods. These weeks were not considered in establishing the discriminatee's average hours of employment in the period prior to her termination. The week of January 6, 2005, was also excluded, as the discriminatee was terminated in the middle of it.

In other situations, a longer period for establishing average earnings might be more appropriate. In this case, all parties agreed that the November–December period was representative of the work schedule for the entire year. Thus, gross backpay was to be determined on the basis of the discriminatee's average earnings during the 6 weeks identified above. Her earnings for those weeks were:

Week	Gross Earnings
November 4	$425.75
November 11	397.80
November 18	440.65
December 2	370.45
December 9	400.00
December 16	405.15
Total earnings:	$2,439.80
Average weekly earnings:	$406.63

Gross backpay computation:

05/1 (January–March): 12 weeks, beginning January 8.
Gross backpay: 12 weeks @ $406.63/week: $4,879.56

05/2 (April–June): 13 weeks
Gross backpay: 13 weeks @ $406.63/week: $5,286.19

05/3 (July–September): 2 weeks, ending July 14.
Gross backpay: 2 weeks @ $406.63/week: $813.26

Cents may be rounded off to whole dollars.

10540.3 Formula Two: The Hours or Earnings of Comparable Employees

Gross backpay, using this method, is calculated on the basis of the hours or earnings of another employee or group of employees, whose work, earnings, and other conditions of employment were comparable to those of the discriminatee both before and after the unlawful action.

For example, the discriminatee is one of a number of truckdrivers working for an employer whose operations are seasonal. Available work is shared among the employees and their average earnings are about the same, but their earnings vary substantially over time. Using this method, gross backpay would be based on the average earnings of the other truckdrivers during the backpay period.

Criteria for adopting this method: This method is applicable when there is an employee or group of employees whose earnings prior to the backpay period were comparable to those of the discriminatee. It is particularly applicable when there have been significant changes in conditions during the backpay period and when it can be concluded that the discriminatee's earnings would have changed in the same manner as did those of the comparable group. When this method is based on the average earnings of a group of employees, it is also an objective basis for calculating earnings in the event there is a dispute over how large a discretionary wage increase a discriminatee would have received, or how well the discriminatee would have performed during the backpay period.

Use of this method requires access to employer records that show work and earnings for a number of employees over a prolonged period. The following should be considered in deciding whether or not this method is appropriate in a given case:

- A comparable employee or group of employees must be identifiable. In some situations, where work assignment is strictly by seniority or other clear rules, a single employee may be identified as comparable to the discriminatee. In that situation, gross backpay may be based on the employment and earnings of the single employee. When a discriminatee is one of a number of employees in a job classification, it is generally more appropriate to average earnings from the group to calculate gross backpay. This is especially so when there is employee turnover within the group during the backpay period.

- The representative employee, employees, or substitutes must continue in the employ of the gross employer[57] during the entire backpay period. The group of representative employees may diminish in size during the backpay period, but this is almost inevitable in a period of significant length. The basic requirement is that the remaining members of the representative group continue to be representative in the same sense as the original group. An alternative to the diminished group is to add comparable employees to it as it decreases in size.

- As in any situation in which a comparison is being made, it is important to be alert to factors that skew the comparison. If a discriminatee is compared to a single employee, did the two have comparable earnings before the unlawful action? Did anything happen during the backpay period, unique to that single employee, that would have affected his or her earnings in a way that would not have affected the discriminatee's earnings? If the comparison is with a group of employees, care must be taken to ascertain that an appropriate group is defined. Further, care must be taken to ascertain that the group does not contain employees—such as new employees, employees with unusual rates of absenteeism, or employees at different wage rates—who are not comparable and whose inclusion in the group will skew its average.

Sample computation of gross backpay based on average earnings of comparable employees: A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on April 1, 2003. The backpay period ended on June 30, 2005, when the discriminatee was reinstated. The respondent was a trucking firm, with about 10 drivers, including the discriminatee. The parties agreed that the drivers' earnings varied during the year, that hours had generally increased during the backpay period, and that two general wage increases were granted during the backpay period as well. The parties also agreed that available work was not assigned through any set system. Some drivers requested more overtime than others, but in general an effort was made to assign work equally. Payroll records showed that some drivers did earn more than others, but that the range of earnings was not great. In the period prior to his termination, the discriminatee had average earnings in comparison with other drivers. It was agreed that gross backpay due the discriminatee should be based on the average earnings of unit drivers during the backpay period.

[57] Gross employer is the employer where the discriminatee was employed at the time of the unfair labor practice.

Respondent's payroll records provided quarterly earnings summaries for all drivers. Drivers who were hired or terminated during a quarter were excluded for purposes of determining average earnings and the following average earnings were calculated for the backpay period.

Yr./Qtr.	*No. of Drivers*	*Total Earnings*	*Average Earnings*
03/2	8	$58,434.00	$7,304.25
03/3	9	82,668.00	9,185.33
03/4	7	47,535.00	6,790.71
04/1	9	95,660.00	10,628.88
04/2	9	78,640.00	8,737.77
04/3	10	40,738.00	4,073.80
04/4	8	56,814.00	7,101.75
05/1	9	55,880.00	6,208.88
05/2	9	61,213.00	6,801.44

Gross backpay due the discriminatee is the average earnings of the unit drivers, as set forth in the column on the right. It reflects changes in earnings that took place from quarter-to-quarter during the backpay period.

10540.4 Formula Three: The Hours and/or Earnings of Replacement Employees

Gross backpay, using this method, is based on the earnings of another employee or series of employees, who replaced the discriminatee during the backpay period.

For example, the discriminatee was terminated from the position of machine operator and prior to the termination worked only on a particular machine. Another employee was assigned to operate that same machine during the entire backpay period. Under this method, gross backpay would be calculated using the hours or earnings of the replacement employee.

Criteria for adopting this method: This method is applicable when the discriminatee had a clearly defined job that was filled by identifiable individuals during the backpay period. When applicable, it is easy to understand and apply, relatively easy to document, and can be applied for long backpay periods in which changes in wages or other conditions of employment took place. The following should be considered in determining whether or not this method is applicable in a given case:

- The replacement employee must be comparable. Although the discriminatee may have performed a specific job, and that job may have been filled by an identifiable replacement employee during the backpay period, the replacement employee may have been paid a different wage rate, may have required more or less overtime to perform the job, may be less skilled or may otherwise have worked under conditions not fairly comparable to those that would have been in effect for the discriminatee.
- Although it may be concluded that a replacement employee worked under different conditions, performance of the replacement may still provide information on which gross backpay may be calculated. For example, gross backpay may be based on the hours worked by a replacement employee at

wage rates that would have been in effect for the discriminatee. Although the replacement employee may have worked at a different rate, the total production of a replacement employee may provide a basis for determining how much work or earnings would have been available to the discriminatee.

Sample computation of gross backpay based on hours worked by a replacement employee: A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on October 31, 2004. The backpay period ended on May 6, 2005, when the discriminatee was reinstated. The discriminatee was the only maintenance mechanic employed by the respondent at its production facility. After her termination, the respondent hired a replacement immediately and he remained employed until the discriminatee was reinstated. The replacement was laid off on the discriminatee's reinstatement. All parties agreed that the hours of work varied for the maintenance mechanic. During the busy season or when there was an emergency, the mechanic was expected to work substantial overtime. At other times, the mechanic was sent home early. The parties agreed that the discriminatee would have worked the same number of hours during the backpay period as her replacement actually did.

The respondent proposed that gross backpay be based on the actual earnings of the replacement mechanic. The replacement earned only $10 per hour, however, whereas the discriminatee was earning $13.25 at the time of her termination. It was agreed that no wage increases were accorded by the respondent during the backpay period. It was finally agreed that gross backpay of the discriminatee would be calculated using the actual hours worked by the replacement mechanic at the discriminatee's hourly wage rate.

Respondent's payroll records summarized both earnings and hours worked, regular and overtime, on a calendar quarterly basis. Using the formula, the following gross backpay was determined.

Hours of Replacement Employee		
Yr./Qtr.	*Regular*	*Overtime*
04/4	300	25
05/1	512	34
05/2	260	55

Earnings @ $13.25/hour regular earnings and $19.875 overtime earnings:

Yr./Qtr.	*Regular*	*Overtime*	*Total Gross Backpay*
04/4	$3,975.00	$496.88	$4,471.88
05/1	6,784.00	675.75	7,459.75
05/2	3,445.00	1,093.13	4,533.13

10542 Considerations Common to the Use of All Methods

In a particular case, a combination of the above methods, or some other method of determining gross backpay, may be reasonable. The following factors should be considered under any method.

10542.1 Comparisons Must Be Reasonable

Gross backpay will almost always be based on some form of comparison. Comparisons must be evaluated to be certain that they are based on full information and are not unfairly skewed. All earnings, including premiums, overtime and bonus payments, must be considered in evaluating a comparison between employees, as well as unusual and nonrecurring situations. In evaluating employee earnings, first and final earnings are often based on less than a complete payroll cycle and are thus lower than normal earnings. Appropriate adjustments must be made for such situations.

10542.2 Use of Ratios

When the discriminatee can be compared to another employee or group of employees, but had "pre-unlawful" action earnings that varied from the comparable employee or group, it may be appropriate to calculate gross backpay based on the earnings of the comparable employees adjusted by an appropriate ratio.[58]

For example, prior to an unlawful termination, the discriminatee consistently earned 5 percent more than the average earnings of all employees in the same job classification. Gross backpay might be reasonably calculated as 105 percent of the average earnings of the other employees during the backpay period.

10542.3 Overtime Hours

Overtime pay is normally paid at a premium of 1-1/2 times regular wages. Care should be taken to verify the rate at which overtime hours are paid by respondent, as well as whether overtime is paid after 8 hours per day or 40 hours per week. For example, Saturdays, Sundays, or holidays may be paid at premium rates.

10542.4 Absenteeism

Under all methods of calculating backpay, adjustments may be appropriate to reflect absenteeism of either the discriminatee or of employees to whom the discriminatee is being compared. If this concern is valid, it should be considered.

If a discriminatee was rarely or never absent, there should be no adjustment for absenteeism. If backpay is based on a projection of the discriminatee's earnings from the period prior to the unlawful action, those earnings should reflect the effect of absenteeism without need for further adjustment.

When backpay is based on comparison with a group of employees, the Board has approved a method of using employee hours, known as the ''Twenty-four hour method,'' that takes into account normal absenteeism but excludes extraordinary absenteeism.[59] Under this method, when payroll records show that the basic workweek was 5 days, only the average hours or earnings of employees working 24 hours or more are used. When the basic workweek is 4 days, only the average hours or earnings of employees working 16 hours or more are used. When the basic workweek is 3 days or less, the average hours of all employees are used.

Other appropriate adjustments for absenteeism may be determined based on the facts or circumstances of the particular case.

[58] See, for example, *Downtown Toyota*, 284 NLRB 1160 (1987).
[59] *Hill Transportation Co.*, 102 NLRB 1015, 1021 (1953).

10542.5 Reduction in Available Employment

If the gross employer's operations or employee complement were reduced during the backpay period, it may be that the discriminatee would have lost employment and earnings even if there had been no unlawful action. Gross backpay must take into account such losses. Payroll or other employment records should establish reductions. Note, however, that if reduced operations are caused by or connected with unfair labor practices, strikes or the like, this section does not apply—Section 10542.7.

When the employer has an established and objective system for employee layoffs or reductions in hours, the system should be applied to determine whether a discriminatee or group of discriminatees would have lost work. When there is no established system to effect layoffs or reductions, gross backpay should be based on an objective method, such as one of the following:

Seniority: Although not universal, use of seniority in layoffs and other employment actions is widespread. It is objective and easy to apply. Seniority dates are also usually easy to document. When used to determine gross backpay, all discriminatees, replacement employees or other comparable employees may be ranked on the basis of seniority. The appropriate basis for seniority that is, by job classification, department, or plantwide—must be determined using the circumstances of each case. Available work, as determined from employment records, may then be apportioned on the basis of seniority.

For example, there is work for only 5 employees during a week, there are 5 employees who actually worked and, in addition, there are 10 discriminatees. To use seniority, all 15 employees should be ranked on the basis of seniority. It should be assumed that the five most senior employees, whether discriminatees or not, would have worked during that week. Gross backpay would be due only to those discriminatees among the five most senior employees.

When using seniority to determine work availability for discriminatees, any employee hired after the unlawful action to replace a discriminatee will almost certainly have lower seniority than any discriminatee.

Proportionalization: If no method of effecting layoffs can be determined, it may be most reasonable to base gross backpay on a sharing, or proportionalization, of available employment among discriminatees.

For example, five employees worked during a week, and each earned an average of $400. There were 10 discriminatees. To use proportionalization, the average earnings should be divided among the 10 discriminatees. Thus, gross backpay due each of the 10 would be $200.

It should be noted that proportionalization is only appropriate when there is more than one discriminatee. In applying it, adjustment should be made for any period in which any discriminatee is unavailable for employment.

Proportionalization is not appropriate in refusal-to-hire cases.[60]

[60] See *FES*, 331 NLRB 9, 14 (2000).

10542.6 Strikes and Lockouts

When a discriminatee has been unlawfully terminated and a strike or lockout occurs during the backpay period, gross backpay normally accrues during the period of the strike or lockout.[61] When a discriminatee is unlawfully terminated during a strike, backpay normally accrues from the date of the discharge.[62] When discriminatees have been unlawfully locked out, backpay continues to accrue even though the discriminatees engage in a strike during the lockout.[63]

In all these situations, the respondent bears the burden of showing that discriminatees would have refused to work during the course of the strike.

The average hours or earnings of the discriminatee or of comparable employees in a normal period may be projected through the strike or lockout period as a basis for calculating gross backpay.

10542.7 Effects of Unfair Labor Practices on Gross Backpay Calculations

The occurrence of an unfair labor practice may be accompanied by turmoil in the workplace, with an effect on hours and earnings of employees. If it is concluded that this has happened, earnings from this period should not be used, or should be appropriately adjusted in calculating backpay.

For example, an employer unlawfully terminates a number of union sympathizers to discourage a nascent organizing campaign. A number of other employees resign in disgust. This abrupt large scale departure disrupts production. Some of the remaining employees must work extraordinary overtime in an attempt to overcome resulting bottlenecks, while other employees are temporarily laid off because no work in progress is moving into their department. Employment and earnings patterns during this period are not likely to be representative of normal operations and may not be an accurate measure of gross backpay.

10542.8 Discriminatee Actions That End Gross Backpay

In cases where discriminatee misconduct or other actions lead to a determination that reinstatement is not required, backpay should also be tolled. See Section 10532.4 for a discussion of actions that might result in ending a normal reinstatement obligation.

10544 Other Components of Gross Backpay

10544.1 Overview

Lost wages are normally the most important component of gross backpay, but all benefits of employment and forms of compensation must be considered in determining gross backpay. In determining net backpay, interim earnings are not usually deducted from nonwage benefits of employment. The following are among forms of compensation that should be considered as components of gross backpay.

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[61] *Hill Transportation Co.*, 102 NLRB 1015 (1953).
[62] *Abilities & Goodwill*, 241 NLRB 27 (1979).
[63] See, for example, *Somerset Shoe Co.*, 12 NLRB 1057 (1939), modified 111 F.2d 681 (1st Cir. 1940).

10544.2 Medical Insurance

Discriminatees should be made whole for expenses they incurred due to the loss of medical insurance resulting from an unlawful action. Such losses usually include charges they paid for medical services that would have been reimbursed under terms of the gross employer's medical insurance plan. Also reimbursable are premiums paid by discriminatees to maintain comparable health insurance, to the extent the premiums exceeded those paid when employed prior to the unlawful conduct.[64]

In addition to reimbursement for incurred expenses, in cases where the gross employer made contributions to a health and welfare fund that provided health insurance, the Board has also ordered the respondent to make contributions to the fund on behalf of the discriminatee for the backpay period.[65]

Reimbursable medical expenses are not offset by interim wage earnings in determining net backpay. Note, however, that any reimbursement paid by a medical insurance benefit obtained from interim employment will reduce expenses incurred by the discriminatee and thus have the effect of reducing the amount due as a result of lost medical insurance.

10544.3 Retirement Benefits

Discriminatees should generally be made whole for lost contributions to pension funds or retirement plans. When the gross employer made contributions to a pension fund, retroactive contributions and appropriate credit should be obtained from respondent. When retirement benefits are in the form of deferred income or profit-sharing plans, appropriate contributions should be paid as well as reimbursement for lost interest.

Retirement benefits are not offset by interim wage earnings. Equivalent retirement benefits earned from interim employment are appropriately offset against gross retirement benefits.

For example, a discriminatee was unlawfully terminated from a trucking company that made contributions on her behalf to the Teamsters pension fund. Contributions and credit for the discriminatee to that fund are a component of the respondent's gross backpay liability.

The discriminatee's first interim employer had a profit-sharing plan. Contributions to that profit-sharing plan should not be offset against the gross liability to make contributions to the Teamsters pension fund.

The discriminatee next had interim employment in a grocery store that was represented by a different union with a separate pension fund. That interim employer made contributions on her behalf to that union's pension fund. Those contributions should not be offset against the gross liability to the Teamsters pension fund, as they do not compensate the discriminatee for credits to the Teamsters pension fund during the backpay period.

[64] See, for example, *RMC Construction*, 266 NLRB 1064 (1982).
[65] See, for example, *G. Zaffino & Sons, Inc.*, 289 NLRB 571, 572 (1988).

Finally, the discriminatee next obtained interim employment with a trucking company that made contributions on her behalf to the Teamsters pension fund. Those contributions provided the discriminatee with credit toward future retirement benefits identical to that which she would have received from the respondent and thus should be offset against the respondent's gross liability to make contributions on the discriminatee's behalf to the Teamsters pension fund.

Tax Deferred Retirement Programs

In recent years tax deferred retirement plans have become a major feature of employer-sponsored retirement packages. While some employers continue to utilize profit-sharing or similar stock ownership programs, the 401(k) plan has become a common feature of retirement programs.

Section 401(k) of the Internal Revenue Code authorizes the use of pretax employee/employer contributions to create a retirement benefit. These plans generally have more variable terms than traditional "defined benefit" pension plans and engender a variety of calculation issues. 401(k) retirement benefits often necessitate individual calculations for each discriminatee, because the value of the benefit is dependent upon many different and highly individualized factors. For example, there are frequently significant differences in each person's contribution rate, the employer's matching contribution and in investment choices. Thus, it is generally necessary to determine individual contribution amounts, employer matching contributions, investment selections, and finally to chart the earnings/loss of each discriminatee's 401(k) investments for the duration of the backpay period.

Experience has shown that reasonably prompt and accurate calculations or estimates of lost 401(k) plan benefits may be obtained directly from the administrator of the 401(k) plan. In this regard, most 401(k) plans are administered by a third party investment firm, mutual fund, bank, or insurance company. Generally, the Region should begin by requesting the respondent obtain a calculation of lost benefits from the plan administrator. However, if the respondent is uncooperative, the Region may contact the third party administrator directly to seek information that will be necessary to complete the backpay calculation. Although plan administrators may not be willing to provide information solely on the strength of an informal request, they are often receptive to Agency inquiries and will generally promptly comply with a Section 11 subpoena seeking the necessary information.

Since the calculation of 401(k) plan benefits may prove complex, Regions should be sensitive to the relative value of the benefit to the overall case and to considering alternative means of estimating and/or calculating the benefit. For example it may be appropriate to estimate the value of the benefit by calculating an average of other employees' 401(k) earnings.

10544.4 Insurance or Plan Benefits

Benefits that would have been paid out under sick leave, life or injury insurance, or other employee plans during the backpay period must also be paid to the discriminatee.

For example, if a discriminatee becomes ill during the backpay period, gross backpay may be tolled. Section 10560.2. If, however, the gross employer had a sick pay

plan or an insurance plan that paid benefits for periods of illness, such payments would be a component of gross backpay.

Such benefits are not offset by wage earnings from interim employment. They are, however, offset by similar benefits paid as a result of interim employment.[66]

10544.5 Holiday and Vacation Pay

Paid holidays and paid vacations that a discriminatee would have received during the backpay period are part of gross backpay. Discriminatees are only entitled to backpay, however, based on lost vacation and holiday pay. Loss of paid time off is a collateral loss for which there is no compensation.

For example, it is determined that a discriminatee would have earned $5200 in a quarter. It is also determined that of these earnings, $800 would have been for a 2-week paid vacation, and $160 would have been for two paid holidays, during which the discriminatee would not have worked. Full gross backpay is $5200, reflecting what would have been earned in the quarter. There is no additional compensation to reflect that the discriminatee would have received paid time off for vacation and holidays from the gross employer.

Lower vacation or holiday pay from interim employment will affect the net backpay determination only as lower interim earnings.

If a discriminatee receives less paid vacation from an interim employer than he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer. Section 10542.5.

If a gross employer has the practice of paying extra vacation wages instead of giving paid vacation time off, such vacation wages should be treated as part of gross backpay.

For example, the respondent provided no paid vacation, but on employees' anniversary dates gave them one week's pay, in addition to their regular wages. Gross backpay for every discriminatee should be based on regular earnings and 1-week's pay as of their anniversary dates during the backpay period.

10544.6 Tips

Tipping is very common in bar, restaurant, and similar service industries. Tips are earnings and must be considered in determining full gross backpay. Tip earnings are, however, often difficult to document.

In recent years, the Internal Revenue Service has required employers in businesses in which tips are customary to report earnings attributable to tips on the basis of a percentage of gross sales. Because of this, employer payroll records and tax forms will often show an amount for tip earnings. It may happen, however, that the employer or discriminatee will argue that actual tip earnings were other than the amounts reported for tax purposes. Tax reports should be considered as a basis for determining tip income, but are not dispositive.

[66] See, for example, *Glen Raven Mills*, 101 NLRB 239, 250 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953).

Other records, such as credit card receipts, diary entries of tip earnings or bank deposits, might provide documentation of actual tip earnings. Statements provided by the discriminatee and by similarly placed employees might also be a basis for determining tip earnings. Employer records of gross sales and of reported earnings can also provide a basis for comparing, projecting and adjusting tip earnings during the backpay period. In the end, determination of tip earnings must be based on a reasonable assessment of documentary evidence and credible testimony.[67]

10544.7 Other Forms of Compensation

A reasonable assessment of the value of housing, demonstration cars, meals, and other forms of compensation that the discriminatee would have received but for the unlawful action must also be included in determining gross backpay.[68]

Such benefits are not normally subject to offsets from interim wage earnings.

10546 Gross Backpay When a Union is a Respondent

Union backpay liabilities may arise from various situations, including causing an employer to terminate a discriminatee for unlawful reasons or unlawfully operating an exclusive hiring hall. Although the union is not the employer, the method of calculating gross backpay is the same as in all other cases. That is, gross backpay is calculated on the basis of what employment the discriminatee would have received had the unlawful action not taken place.

For example, if a union caused the gross employer to terminate a discriminatee, gross backpay will be based on what employment the discriminatee would have had with that employer, but for the termination.

If a union unlawfully failed to refer a discriminatee from its hiring hall, gross backpay will be based on what employment and earnings would have resulted from that referral.

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[67] For example, *Hacienda Hotel & Casino*, 279 NLRB 601 (1986); and *Original Oyster House*, 281 NLRB 1153 (1986).

[68] Examples of the variety of payments included in gross backpay are: *Underwood Machinery Co.*, 95 NLRB 1386, 1403 (1951) (promotions); *Peyton Packing Co.*, 129 NLRB 1275, 1276 (1961); *Indianapolis Wire-Bound Box Co.*, 89 NLRB 617, 642, 650 (1950) (loss resulting from discriminatory eviction); *McCarthy-Bernhardt Buick*, 103 NLRB 1475, 1488 (1953); *C. Pappas Co.*, 82 NLRB 765, 767, 796 (1949) (commission increases); *Phoenix Mutual Life Insurance Co.*, 73 NLRB 1463, 1466 (1947) (commissions and renewals); *Stanton Enterprises*, 147 NLRB 693, 699 (1964), enfd. 351 F.2d 261 (4th Cir. 1965); *Home Restaurant Drive-In*, 127 NLRB 635 fn. 2 (1960) (tips); *Hickman Garment Co.*, 196 NLRB 428, 429 fn. 2 (1962), enfd. 471 F.2d 611 (6th Cir. 1972) (Christmas bonus); *Aerosonic Instrument Corp.*, 128 NLRB 412, 414 (1960) (incentive bonus); *Dinion Coil Co.*, 96 NLRB 1435, 1461 (1951), enfd. 201 F.2d 484 (2d Cir. 1952) (holiday pay); *Nabors v. NLRB*, 323 F.2d 686, 689–690 (5th Cir. 1963), enfd. in relevant part 134 NLRB 1078, 1085–1087 (1961), cert. denied 376 U.S. 911 (1964) (profit-sharing bonus); *International Trailer Co.*, 150 NLRB 1205, 1210, 1211 (1965) (incentive and leadership bonus); *Golay & Co.*, 184 NLRB 241, 242–243, 247 (1970), enfd. 447 F.2d 290, 294–295 (7th Cir. 1971) (wage increases, vacation pay, and insured medical expenses); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1126–1129 (1965), enfd. in relevant part 365 F.2d 888, 892 (D.C. Cir. 1966) (pension contributions); *Madison Courier*, 180 NLRB 781, Appendix A at 795 fn. __ (1970), remanded on other grounds 472 F.2d 1307 (D.C. Cir. 1972) (insurance premiums and Christmas bonus); *Tennessee Packers*, 160 NLRB 1496, 1501 (1966) (sick); *Ellis & Watts Products*, 143 NLRB 1269, 1270 (1963), enfd. 344 F.2d 67 (6th Cir. 1965) (overtime); *Brown & Root*, 132 NLRB 486, 491 (1961), enfd. in relevant part 311 F.2d 447 (8th Cir. 1963) (shift differential); *Heinrich Motors*, 166 NLRB 783, 786 (1967), enfd. 403 F.2d 145 (2d Cir. 1968) (vacation pay); *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1713 (1965), enfd. in relevant part 360 F.2d 569, 572–573 (5th Cir. 1966) (safety awards); *L. J. Williams Lumber Co.*, 93 NLRB 1672, 1676, 1691 (1951), enfd. 195 F.2d 669, 672–673 (4th Cir. 1952), cert. denied 344 U.S. 834 (payments for transporting employees to plant); *Taylor Mfg. Co.*, 83 NLRB 142, 144 (1949) (Veterans Administration payments under G.I. program); *Raymond Pearson, Inc.*, 115 NLRB 190, 192, 210 (1956), enf. denied on other grounds 243 F.2d 456 (5th Cir. 1957) (employer ordered to pay to deceased discriminatee's estate any losses suffered with regard to bonuses, emoluments, insurance coverage, and other benefits accorded to employees by employer and which discriminatee would have enjoyed but for discharge); *Texas Co.*, 42 NLRB 593, 609 (1942), enfd. 135 F.2d 562 (9th Cir. 1943) (room and board); *Delorean Cadillac*, 231 NLRB 329 (1977) (reimbursement for loss of use of company demonstrator car).

Because the gross employer may not be a respondent in these cases, there may not be access to employer employment and earnings records. Section 10538.3 suggests other sources of obtaining information needed to determine backpay. In addition, it may be appropriate to seek gross employer records through use of an investigative subpoena. Section 10618.

Hiring hall records should provide information concerning which employees were referred and to which employers. Union benefit fund reports might serve to document actual employment of comparable employees during the backpay period.

In addition, because the union is not the employer, it cannot end the backpay period itself by offering reinstatement. In some circumstances, such as when there is also an unfair labor practice proceeding against the employer, the union may toll its backpay liability by notifying the employer and the discriminatees in writing that it has no objection to their reinstatement.[69] When there are unfair labor practice proceedings against both union and employer, primary liability may be against either, depending on the circumstances of the case.[70]

When the union is solely liable for backpay, the Board has found that backpay should not be tolled until the discriminatee is either reinstated by the employer or until the discriminatee obtains substantially equivalent employment elsewhere.[71]

10548 Use of Alternative Methods in Backpay Determinations

In order to make efficient use of Agency resources and expedite the calculation and distribution of backpay in certain cases, Regions are encouraged to consider innovative methods, such as those described below, even where such methods may result in computations that are somewhat less precise than traditional Board methods. The types of cases that may be appropriate for the utilization of alternate computation methods are those that involve large numbers of claimants over extended backpay periods, refusal to reinstate strikers, contract abrogation, hiring halls and dues reimbursement cases. To the extent possible, the Region should get the agreement of the parties as to the use of these novel approaches.

10548.1 Statistical Sampling Techniques

Statistical sampling is a widely accepted procedure to determine characteristics of a population by selecting and analyzing data from a small percentage of the population. These methods can be used for both settlements and formal compliance proceedings to accurately approximate gross backpay, interim earnings, reimbursable expenses and other monetary remedies. Sampling is particularly well suited to cases involving many individuals and when individual data is difficult to obtain or extremely time consuming to analyze.[72]

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[69] See, for example, *C. B. Display Service*, 260 NLRB 1102 (1982); and *Port Jefferson Nursing Home*, 251 NLRB 716 (1980).

[70] See, for example, *Q.V.L. Construction*, 260 NLRB 1096 (1982); *Hendrickson Bros.*, 299 NLRB 442 (1990); *Exxon Co.*, 253 NLRB 213 (1980); and *Zoe Chemical Co.*, 160 NLRB 1001 (1966).

[71] See, for example, *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981); *Iron Workers Local 118 (Pittsburgh Des Moines Steel)*, 257 NLRB 564, 567–568 (1981).

[72] See, for example, *Laborers Local 135 (Bechtel Power Corp.)*, 301 NLRB 1066 (1991), and 311 NLRB 617 (1993), where the Board affirmed a compliance specification based on use of random samples to determine liability in a hiring hall case. Available records made it impossible to reconstruct all out-of-order hiring hall referrals, so backpay for all improperly referred individuals was projected based on the average loss of the individuals selected in the sample.

For example, a case involves 800 unfair labor practice strikers who made unconditional offers to return to work on the same day and were refused reinstatement. One year later, all discriminatees received valid offers of reinstatement. Gross backpay is not in dispute. However, obtaining and analyzing interim earnings information for such a large number of individuals to calculate backpay by traditional methods would obviously be an extremely time-consuming project. Rather, detailed quarterly interim earnings and expense information from a relatively small randomly selected sample of the discriminatees could be obtained. Average quarterly interim earnings and expenses of the sample could then be applied to all discriminatees in the case to approximate their net backpay.

Specific methods and the degree of precision required will vary depending on the circumstances of the case. When sampling or other statistical modeling techniques are used to determine remedies in formal compliance proceedings, the Compliance Officer should contact the Contempt Litigation & Compliance Branch for assistance with developing the formula and for referrals to outside statisticians, who can provide expert advice and potentially testify in support of the formula at the compliance proceeding. Less precision may be required when these methods are used to determine remedies for settlement agreements.

10548.2 Use of Approximations and Averages

The nature of some violations, particularly those involving unilateral changes or withdrawal of recognition, may make it impractical to precisely determine individual backpay amounts. In those situations the best formula may be a reasonable approximation based on available evidence.

For example, prior to an unlawful unilateral change, nonmandatory overtime was made available to unit employees based on seniority. The respondent changed to a rotation procedure not based on seniority. Because the overtime was not mandatory, there is no practical formula to determine exactly how much overtime each individual "lost" because of the change. A reasonable approximation can be made by obtaining records to show the amount of overtime each individual worked in the 2 years prior to the change and the total amount of all overtime worked during that period and then computing each individual's overtime as a percentage of total overtime hours worked in the 2-year period. Each individual's share of overtime worked during the backpay period can be projected by multiplying the individual percentage factor by the total overtime hours worked by all employees during the backpay period.[73]

10548.3 Alternative Approaches to Allocation of Lump Sum Backpay Amounts

When total net backpay liability has been determined or agreed upon, it may be appropriate to develop and utilize nontraditional methods to expedite the distribution of backpay shares to individual discriminatees. In cases resolved by settlement, any equitable method of distribution to which the parties agree may be acceptable, including equal share distribution, omission of consideration of interim earnings and expenses in

[73] See *Intermountain Rural Electrical Assn.*, 317 NLRB 588 (1995). See also *Great Lakes Chemical Corp.*, 323 NLRB 749 (1997), for a discussion of a formula to approximate backpay in a refusal to hire case where the respondent hired substantially less than the number of employees it actually needed and required them to work significant overtime to avoid a successorship obligation. In both cases the Board noted the General Counsel is required only to utilize a nonarbitrary formula designed to produce a reasonable approximation of what is owed.

determining shares, and use of a formula based on averages or samples. See also Sections 10562.4 and 10648.7.

For example, a respondent's unlawful withdrawal of recognition resulted in its discontinuance of contractual economic benefits, such as overtime after 8 hours, bonuses and shift premiums. The parties reached a settlement as to a total lump sum backpay amount. Assuming this is a large unit and the backpay period extends over several years, determining individual shares by analyzing respondent payroll records would be a time-consuming project and delay distribution of backpay. Equal share distribution may be appropriate, but such a method may overpay individuals who worked only a portion of the backpay period and minimize backpay to individuals who worked the full period. An alternative approach could be to assign a percentage factor to each individual based on the number of weeks they worked in the unit during the backpay period compared to total number of weeks worked by all unit employees during the backpay period. Each individual's share of the lump sum would be determined by multiplying their percentage factor by the lump sum amount. See Appendix 5 for an example of a simple spreadsheet using this method.

10550 Interim Earnings

10550.1 Overview

All compensation earned by a discriminatee following the unlawful action (during the backpay period) must be considered as interim earnings. Generally, interim earnings are deducted from gross backpay in determining the net backpay due a discriminatee. There are, however, exceptions; see, for example, Section 10554.

The Compliance Officer will fully investigate interim earnings, determine all issues involving proper treatment of interim earnings and make appropriate offsets against gross backpay to calculate net backpay. Full investigation of interim earnings issues is necessary to achieve settlement of or voluntary compliance with backpay requirements in unfair labor practice cases, as well as to prepare for a compliance hearing, should such a proceeding be necessary.

In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action.[74]

10550.2 Maintaining Contact With Discriminatees

The discriminatee is the most important source of information regarding interim earnings and adjustments to gross backpay needed to determine net backpay. It is of utmost importance that contact is maintained with discriminatees throughout the course of unfair labor practice proceedings.

Regions are encouraged to set up a database system to facilitate continuing contact with discriminatees during the pendency of the cases. The database can be used to maintain current contact information for each discriminatee in all pending cases. This database can also be used as the basis for a "mail merge function" for transmitting

[74] See, for example, *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962).

expense and search for work forms to discriminatees on a quarterly basis. The Contempt Litigation & Compliance Branch can provide assistance in setting up such a system.

10550.3 Interviewing Discriminatees

At appropriate times in the course of compliance proceedings, all discriminatees should be interviewed either in person or by telephone to review and update information concerning the following issues:

- availability for employment,
- efforts to obtain interim employment,
- identity of all interim employers,
- earnings from interim employment,
- expenses incurred in seeking and holding interim employment, and
- periods of low earnings and unemployment.

During the interview, the Compliance Officer should address any issues concerning the discriminatees' responsibility to seek interim employment and their availability for interim employment. Sections 10558 and 10560.

The result of the discriminatee interview should be a complete account of their employment related activities during the backpay period and identification of all issues concerning interim earnings, expenses, and availability for employment.

10550.4 Documentation

The Compliance Officer should obtain documentation of interim earnings whenever appropriate. Discriminatees should cooperate in providing the most common form of documentation of interim earnings: pay slips, W-2 forms or other earnings reports from the interim employer. State unemployment services generally maintain excellent records of gross earnings from all employers. Such records are usually conveniently organized by calendar quarter. Compliance Officers may have individual discriminatees obtain these records from their state unemployment office. Regions may also obtain these records directly from the state either in hard copy or electronically.

It may be inappropriate to contact current interim employers for earnings information because communications from the Compliance Officer could adversely affect the discriminatee's current employment relationship. Thus, the Compliance Officer should consult with the discriminatee regarding that relationship before going to the current interim employer for earnings information.

Former interim employers may be contacted to obtain appropriate documentation, although without discriminatee authorization many employers will not release employment information.

Appendix 6 sets forth a pattern letter that may be used for requesting earnings information from an interim employer.

In those situations where interim employer records are not available, Section 10538.3 sets forth sources that may be used to document earnings.

Note also that a discriminatee's failure to cooperate in the investigation and documentation of interim earnings may indicate an effort to conceal interim earnings. Section 10550.5 (immediately following).

10550.5 Discriminatee Concealment of Interim Earnings

In most cases, the discriminatee interview and submission of supporting earnings documentation should resolve interim earnings issues. When a respondent challenges the completeness of a discriminatee's account, the Compliance Officer should investigate the respondent's contentions.

When the Region is satisfied that a complete account of interim employment and earnings has been obtained, it should so advise the parties. The respondent then assumes the burden of establishing additional interim earnings. See Section 10550.1.

In cases where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment.[75] If the Region concludes that a discriminatee has concealed interim earnings and, therefore, is not entitled to any backpay during the period of concealment, the charging party should be notified. Should the charging party dispute the Region's determination in a post Board Order case, the Compliance Officer should advise the charging party that it has the right to request a written determination by the Regional Director. See Section 10602 and the Rules and Regulations, Sections 102.52 and 102.53, regarding the compliance determination letter and the charging party's appeal rights.

10552 Interim Earnings That Require Special Consideration

In most situations, interim earnings will be based on an hourly wage or a set salary and total interim earnings will be easily summarized and offset against gross backpay. Some forms of earnings and compensation do require special consideration. Examples include the following:

10552.1 Earnings in Addition to Base Wages or Salary

Premiums, tips, bonus payments, awards, holiday and vacation pay, and similar forms of compensation are earnings. In determining net backpay, they should be treated by the same methods used in determining gross backpay and included with regular interim earnings. Sections 10540.1 and 10544.4–10544.7.

Sections 10554.1–10554.5 discuss situations in which interim earnings are not deducted from gross backpay.

10552.2 "Under-the-Table" Earnings

Any compensation paid for providing service is a form of earnings, regardless of whether it has been properly reported for income tax purposes. Cash or under-the-table earnings obtained during the backpay period should be treated like any other interim earnings.

[75] See *American Navigation*, 268 NLRB 426 (1983); *C. R. Adams Trucking*, 272 NLRB 1271, 1276 (1984); see also *Ad Art*, 280 NLRB 985 fn. 2 (1986).

10552.3 Self-Employment

A discriminatee's decision to engage in self-employment should not be regarded as a failure to seek interim employment. In general, self-employment should be regarded as a reasonable effort to mitigate losses. Section 10558.

Net earnings from self-employment during the backpay period should be offset against gross backpay.

The Compliance Officer may face problems in determining net earnings from self-employment. In general, net earnings are the difference between gross receipts and offsetting expenses. Income statements and other records kept for a business by an outside accountant are generally the best means of determining net earnings. If the discriminatee did not use an outside accountant, his or her business records may be the only documentation of earnings available. Federal tax returns may also establish net earnings from self-employment. Internal Revenue Schedule C is the form used to report net earnings from self-employment; the schedule requires reporting of gross receipts as well as offsetting expenses approved by IRS.

Tax returns are not dispositive of net earnings from self-employment. For example, it may be shown that tax returns were not properly prepared or that expenses claimed against net earnings for tax purposes were in fact some form of compensation to the discriminatee.

In addition, when a substantial source of revenue for a self-employed discriminatee is the discriminatee's invested capital in the business, some adjustment of the income from the business should be made to apportion earnings between the part resulting from their invested capital and that from services. The usual method of doing this is to deduct the interest that would have been paid by the discriminatee to a willing lender of the investment capital, rather than conventional legal interest.

As in other aspects of the backpay investigation, the goal in determining net income from self-employment is to reach reasonable conclusions as to actual earnings based on the facts and circumstances presented.[76]

10552.4 Medical and Retirement Benefits

A medical insurance plan or contributions to a retirement fund are not normally treated as interim earnings and offset against gross backpay. Note also that although these benefits are considered components of gross backpay, they are not normally subjected to offsets from wages earned in interim employment. Health insurance and retirement contributions earned through interim employment may, however, be offset against equivalent benefits that are components of gross backpay. Sections 10544.2 and 10544.3.

10552.5 Other Nonwage Compensation

The reasonable value of other forms of compensation, such as employer-provided housing, cars, or meal allowances, should be treated as interim earnings and offset against gross backpay.[77]

[76] See, for example, *Velocity Express, Inc.*, 342 NLRB 888 (2004), *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980).
[77] See, for example, *Empire Worsted Mills*, 53 NLRB 683, 692 (1943).

Nonwage forms of compensation, when part of gross backpay, are not normally offset by wages earned in interim employment. Section 10544.1.

In some circumstances, it is not appropriate to deduct such nonwage compensation from gross backpay. For example, where an interim employer provides employee housing, but such is required because the work is in a remote location, the housing may have no real value or be equivalent to an expense the discriminatee would have had to incur in order to obtain the interim employment.

10554 Earnings and Income Not Deductible From Gross Backpay

Interim earnings are generally offset against gross backpay. Exceptions are discussed in the following sections. Further, unearned income is generally not offset against gross backpay.

10554.1 Unearned Income and Collateral Benefits Not Deductible

Unearned income is income derived from any source other than an employment relationship. Collateral benefits are any form of assistance not based on employment or a return of service by the recipient. Unearned income and collateral benefits can include interest earnings from stock or savings; gifts or loans where no work or service is expected in return; most forms of public assistance; and most forms of insurance payments.[78]

Unemployment insurance payments are collateral benefits; as such, they are not interim earnings and are not offset against gross backpay.[79]

Strike benefits are collateral benefits if they are given without condition. If a union requires a discriminatee to perform strike duty or some other form of service as a condition for receiving strike benefits, the strike benefits may be earnings and offset against gross backpay.[80]

10554.2 Earnings During Periods Excepted from Gross Backpay Not Deductible

When it has been determined that there is no gross backpay liability during some period within the backpay period, interim earnings earned during the same period should not be offset against any gross backpay for another period or for the entire period.[81]

For example, it is established that the respondent shut its operation down for 4 weeks during the backpay period. As a result, there is no gross backpay liability during that 4-week period. Any interim earnings that the discriminatee earned during that period should not be offset against gross backpay determined due during other parts of the backpay period. Care must be taken to determine what interim earnings were actually earned during such excepted periods.

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[78] See *Medline Industries*, 261 NLRB 1329, 1337 (1982), for a discussion of collateral benefits.
[79] *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951).
[80] See, for example, *Lundy Packing Co.*, 286 NLRB 141 fn. 2 (1987), enfd. 856 F.2d 627 (4th Cir. 1988). See also *Hansen Brothers Enterprises*, 313 NLRB 599, 605 (1993).
[81] See, for example, *San Juan Mercantile Corp.*, 135 NLRB 698, 699 (1962).

10554.3 Interim Earnings Based on Hours in Excess of Those Available at Gross Employer Not Deductible

In cases where a discriminatee worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay.[82]

This situation is most likely to occur when a discriminatee worked more overtime hours for an interim employer than would have been available with the gross employer, but is applicable in any situation.

For example, it is determined that gross backpay is based on a wage rate of $10 per hour and a regular workweek of 40 hours, or $400 per week. Total interim earnings for the same period are $440 per week, but are based on a regular hourly wage rate of $8, a regular workweek of 40 hours, and 10 hours of overtime per week. Although full interim earnings exceed gross backpay, in this situation it is not appropriate to offset the interim earning derived from overtime against gross backpay. Thus, only interim earnings from the regular 40-hour workweek, or $320, should be offset against gross backpay.

Similarly, if it is determined that gross backpay is based on a reduced workweek of 30 hours, only those earnings derived from the first 30 hours of interim employment should be offset against gross backpay.

Net backpay is determined on the basis of calendar quarters. Sections 10564.2 and 10564.3. Consistent with this policy, excess interim hours must also be allocated to calendar quarters and compared with gross hours only within the same quarter.

10554.4 Supplemental Employment or Moonlighting

When a discriminatee holds two separate jobs simultaneously during the backpay period, income from the second job is generally not deductible against gross backpay. If the discriminatee held a second job before the unlawful action and continued to hold that job through the backpay period, earnings from the second job are not deductible.[83] This principle applies even if the supplemental employment is not continuous or is with different employers.[84]

For example, a discriminatee worked as a musician during evening hours prior to the unlawful action. He continues this part-time work during the backpay period, working as a musician for different employers. These earnings are not offset against gross backpay.

If the discriminatee had no second job before the unlawful action, but during the backpay period holds either two full-time jobs or one full-time job plus an additional part-time job, only the earnings from one full-time job should be deducted. This is consistent with the principle that interim earnings based on hours in excess of those available at the gross employer are not deductible. Section 10554.3.

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[82] See, for example, *United Aircraft Corp.*, 204 NLRB 1068, 1073–1074 (1973); See also *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989).

[83] See, for example, *Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952); see also *U.S. Telefactors Corp.*, 300 NLRB 720, 722 (1990).

[84] See *Regional Import & Export Trucking Co.*, 318 NLRB 816 fn. 9 (1995).

If the discriminatee held a second job prior to the unlawful action and then increased the hours of employment at that job during the backpay period, earnings derived from the increase in hours are deductible interim earnings.[85]

For example, prior to his unlawful termination, the discriminatee did carpentry work on weekends. During the backpay period, he does this work throughout the week. Earnings from the additional hours of work beyond those the discriminatee normally worked prior to the termination should be treated as deductible interim earnings.

10554.5 Interim Earnings During Periods That Would Have Been Paid Vacation Periods Under the Gross Employer

If a discriminatee receives less paid vacation from an interim employer than he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer.[86]

10556 Expenses Deductible From Interim Earnings

Expenses incurred by a discriminatee in seeking or maintaining interim employment are deducted from interim earnings, thus reducing the amount of interim earnings offset against gross backpay.[87] Such expenses include expenses that would not have been incurred during the course of gross employment, such as increased transportation costs in seeking or commuting to interim employment, the cost of tools or uniforms required by an interim employer, room and board when working away from home, contractually required union dues and/or initiation fees, if not previously required while working for respondent,[88] or the cost of moving if required to assume interim employment.

Expenses are only deducted from interim earnings. They are not added to gross backpay. Thus, when there have been no interim earnings, expenses incurred in seeking interim employment have no effect on net backpay, which would be based on gross backpay without any offset. Expenses incurred in seeking or holding interim employment should be allocated to calendar quarters. Sections 10564.2 and 10564.3.

For example, the discriminatee obtains interim employment, but the interim employer is located 20 miles farther from her home than the gross employer. Mileage for the additional drive should be deducted from earnings at the interim employer before offsetting those interim earnings against gross backpay, by using the mileage rate in effect at the time to compensate Federal employees for their use of private automobiles while on Government business.

Deductible expenses may be determined on the discriminatee's account and reasonable conclusions made. Early contact with the discriminatee can avoid later problems in documenting expenses by advising the discriminatee of the importance of

[85] See, for example, *Golay & Co.*, 184 NLRB 241, 245 (1970).
[86] See *Heinrich Motors*, 166 NLRB 783, 792–793 (1967), enfd. 403 F.2d 145 (2d Cir. 1968); see also *Central Freight Lines*, 266 NLRB 182, 183 (1983).
[87] See, for example, *Nelson Metal Fabricating*, 259 NLRB 1023 (1982), and *UARCO, Inc.*, 294 NLRB 96, 102 (1989).
[88] See *Nelson Metal Fabricating*, supra.

keeping appropriate records. It may also be appropriate to require documentation of some expenses.

In a compliance hearing the Region bears the burden of proving expenses that will be offset against interim earnings. Section 10648.4.

Evidence of expenses incurred in seeking interim employment may also serve to establish the discriminatee's effort to mitigate losses. Section 10558.

10558 Mitigation

10558.1 Overview

A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate.[89]

Respondents often question a discriminatee's efforts to seek employment, particularly when the discriminatee has been unemployed for a substantial period. The Compliance Officer should investigate the discriminatee's search for work, keeping in mind that the Board and courts have found that the discriminatee's obligation is to make a reasonable effort to find work under existing circumstances.[90] The focus of the investigation is on the search for work; the discriminatee's success or failure in finding work is not determinative.[91] The Board has found that a wide range of efforts meets the reasonable effort standard and resolved doubt in favor of the discriminatee as the wronged party.[92]

If, following the investigation, the Region concludes that the discriminatee has met his or her obligation to mitigate, it is the respondent's burden to establish that the discriminatee failed to make a reasonable effort to seek interim employment.

See Section 10592.6 regarding treatment of disputed mitigation in settlement discussions.

See Sections 10648.4 and 10648.6 regarding treatment of mitigation in a compliance proceeding.

10558.2 Investigating Mitigation

The Compliance Officer is responsible for investigating mitigation issues. The discriminatee's account of his or her efforts to obtain employment and of any loss of interim employment will be the primary source of information upon which a determination will be based. Whenever there is a mitigation issue, the discriminatee should give a complete account of his or her efforts to seek employment. Particular attention is appropriate for prolonged periods of unemployment.

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[89] See, for example, *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 fn. 7 (1957).

[90] See, for example, *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422–423 (1st Cir. 1968); see also *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976).

[91] See, for example, *Midwest Motel Management Corp.*, 278 NLRB 421 (1986).

[92] See, for example, *United Aircraft Corp.*, 204 NLRB 1068 (1973); see also *Lundy Packing Co.*, 286 NLRB 141 (1987).

The Region should not allow respondent counsel to interview discriminatees concerning mitigation issues without clearance from the Division of Operations-Management. Section 10592.7.

As set forth in Section 10508.8, the Compliance Officer is responsible for communicating with discriminatees as soon as the Region has determined that a violation has occurred that may result in a backpay remedy. Disputes concerning mitigation may be avoided if the discriminatee is clearly advised at that time of his or her obligation to mitigate; the discriminatee should be further advised to keep careful notes or records of his or her efforts to seek interim employment. Form NLRB-4288 contains such advice.

10558.3 Evaluating Mitigation Efforts

The efforts a discriminatee is expected to make to get interim employment are those expected of reasonable persons in like circumstances. A variety of actions may demonstrate an effort to seek employment, including registering with state or private employment services, checking newspaper ads, visiting employers, and asking friends and relatives. Specific actions to seek employment may be influenced by age, health, education, employment history, and station in life, as well as by employment and unemployment trends in the area. The presence or absence of any particular search activity does not determine mitigation.

Failure to obtain interim employment, even for a prolonged period, does not establish a failure to mitigate.

The evaluation of mitigation must take into account circumstances that limit opportunities and discourage efforts (for example, unemployment may be high or a discriminatee may have limited skills). In such circumstances, the number of employment applications filed or even the amount of time devoted to searching for employment is not dispositive of mitigation.

Discriminatees who have been terminated from skilled or high wage employment may reasonably limit their job search to equivalent employment.[93] Discriminatees are not normally required to accept lower-paying employment or to move in order to accept employment.[94]

In the context of an overall search effort, the Board has found that a brief period during which a discriminatee undertook no activities to seek employment did not constitute a failure to mitigate.[95]

In the end, a determination of mitigation will depend on applying the standard of reasonable efforts to the unique circumstances of the case.

10558.4 Loss of Interim Employment

An unreasonable discriminatee action that results in a loss of interim employment may constitute a failure to mitigate. Should a discriminatee reject an offer of interim

[93] Discriminatees with "extensive experience in a specialized field" may be required to seek interim employment within their area of specialization avoid a finding of willful loss. *Associated Grocers*, 295 NLRB 806, 811 (1989); *NHE/Freeway, Inc*., 218 NLRB 259 (1975); *Knickerbocker Plastic Co.*, 132 NLRB 1209 (1961).

[94] See, for example, *Hacienda Hotel & Casino*, 279 NLRB 601, 605–606 (1986); see also *Iron Workers Local 15*, 298 NLRB 445, 469 (1990).

[95] See, for example, *Saginaw Aggregates*, 198 NLRB 598 (1972); see also *Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

employment, quit interim employment, or be terminated from interim employment, the circumstances should be fully investigated. The discriminatee should be interviewed and corroboration sought from the interim employer if appropriate.

When a discriminatee voluntarily quits interim employment, the burden shifts from the respondent to the Region to show that the decision was reasonable.[96]

When a discriminatee has been involuntarily terminated from interim employment, however, a higher standard may apply, namely that the discriminatee must have engaged in gross misconduct, before the termination constitutes a failure to mitigate.[97]

When it is determined that a loss of interim employment was a failure to mitigate, the amount of lost interim earnings should be calculated and offset against gross backpay as though actually earned by the discriminatee.[98]

10560 Unavailability for Employment or Withdrawal From Labor Market

10560.1 Overview

When a discriminatee becomes unavailable for employment or withdraws from the labor market, gross backpay is generally tolled for the period of unavailability. Investigation of this issue will again depend largely on the discriminatee interview. Sources of documentation could include medical records, school records, or institutional records, depending on the case. Common situations of unavailability for employment are discussed in the following sections.

10560.2 Illness or Injury

In general, backpay is tolled for a discriminatee who has been unable to work due to illness or injury for a period of 3 days or more. If the gross employer had sick leave or similar benefits, compensation due under such benefits should be considered as a component of gross backpay. Section 10544.4.

10560.3 Exceptions: Unavailability Due to Injury or Illness Attributable to Interim Employment or Unfair Labor Practices

Exceptions to the general policy are when periods of unavailability for employment result from an injury suffered during interim employment[99] or from an unfair labor practice.[100]

10560.4 Pregnancy

When a discriminatee is unavailable for employment as a result of pregnancy, backpay is often tolled. The period of unavailability is not determined by any formula, but must be established in each case. The appropriate tolling period is the period the discriminatee would have taken off from work in the absence of any unlawful action. This period may be established by any relevant evidence, including the statement of the

[96] See, for example, *Pope Concrete Products*, 312 NLRB 1171, 1173 (1993); *Big Three Industrial Gas Co.*, 263 NLRB 1189, 1199 (1982); and *Alamo Cement Co.*, 298 NLRB 638 (1990).
[97] See *Ryder Systems*, 302 NLRB 608, 610 (1991).
[98] See *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1212–1216 (1961).
[99] See, for example, *American Mfg. Co.*, 167 NLRB 520, 522–523 (1967).
[100] See, for example, *Greyhound Taxi Co.*, 274 NLRB 459 (1985), see also *Moss Planning Mill Co.*, 103 NLRB 414, 419 (1953).

discriminatee, medical records, the amount of pregnancy leave taken for past pregnancies, and the gross employer's medical leave policies, unless those policies violate relevant equal opportunity laws, including the Family and Medical Leave Act of 1993.

10560.5 Attendance at an Educational Institution

Backpay should normally be tolled during any period in which the discriminate is a full-time student. This normal policy may be rebutted if the discriminatee was a full-time student prior to the unlawful action, or can demonstrate an availability for employment through such actions as continued efforts to seek employment or an established willingness to leave school at any time for employment or reinstatement.[101]

10560.6 Military Service

Service in the Armed Forces constitutes unavailability for employment.[102]

10560.7 Undocumented Workers

The Supreme Court concluded in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), that Immigration Reform and Control Act (IRCA) precludes the Board from awarding backpay to any terminated individual who was not legally authorized to work in the United States during the backpay period, inasmuch as such award conflicted with Federal statues and policies unrelated to the Act.

As a result of the Supreme Court's decision in *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 902–903 (1984), the Board has conditioned the reinstatement remedies of discriminatees on their being lawfully entitled to be present and employed in the United States.

General Counsel Memoranda 88-9, 98-15, and 02-06 set forth current policy regarding reinstatement and backpay where a discriminatee's legal status is in dispute. Effective November 6, 1986, IRCA established, among other provisions, requirements that employers verify the legal residence status of employees.

Discriminatees first hired before November 6, 1986: The respondent is responsible for establishing that a discriminatee hired before the IRCA effective date is not lawfully entitled to be present and employed in the United States. This burden is met only by proffering a final U.S. Citizenship and Immigration Services (USCIS) determination that a discriminatee is not lawfully entitled to be present and employed. Because of this, it is not necessary or proper to address a discriminatee's immigration status before the Board, as the determination of this status must be made by the USCIS.

Regions should submit to Advice any cases which present the question of whether a respondent could rely on an USCIS determination that has been appealed.

Compliance action should not be held in abeyance pending the outcome of any USCIS proceeding. A discriminatee hired on or before November 6, 1986 is presumed to be entitled to backpay and reinstatement unless and until USCIS determines that he or she is not entitled to be present and employed in the United States.

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[101] See, for example, *J. L. Holtezendorff Detective Agency*, 206 NLRB 483, 484–485 (1973).
[102] *U.S. Steel Corp.*, 293 NLRB 640 fn. 2 (1989).

A final USCIS determination that a discriminatee is not entitled to be lawfully present and employed in the United States forecloses a reinstatement and backpay remedy.

Discriminatees first hired after November 6, 1986: Under provisions of IRCA, an employer who knowingly hires "unauthorized workers" after November 6, 1986 is subject to criminal sanctions. Employers must also obtain verification from employees hired after November 6, 1986 that they are lawfully present and available for employment in the United States.

A respondent who reinstates an employee who was first hired before November 6, 1986, is not subject to these IRCA provisions, as an unlawful termination is not considered an interruption in employment.

Respondents must comply with IRCA provisions for all employees hired after November 6, 1986, and thus may require that discriminatees complete the appropriate portion of the I-9 form and submit appropriate documentation as a condition of reinstatement. Thus, where the respondent knows at the time of hire that a discriminatee is ineligible for employment, the appropriate remedy is for respondent to extend an offer of reinstatement only after the discriminatee presents to the employer, within a reasonable time, completed USCIS Form I-9s sufficient to establish his or her work eligibility. *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997). No backpay is due under these circumstances. *Hoffman Plastics*, supra. In situations where discriminatees do not complete an I-9 form and present appropriate documentation, both reinstatement and backpay are precluded. If a respondent can establish that it would not have hired or retained the discriminatee had it known of his or her undocumented status during the period of employment, Regions should refrain from seeking a reinstatement or backpay remedy. If the respondent contends that a discriminatee has submitted fraudulent documentation of immigration status, the issue should be submitted to Advice. Regions should also submit to Advice any issue concerning a discriminatee's failure to seek or obtain interim employment because of an inability to provide required documentation of immigration status.

Regions should continue to seek compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions (for example, a unilateral change of pay or benefit).[103]

10560.8 Other Forms of Unavailability for Employment or Withdrawal From the Labor Market

Unavailability for employment may result from any number of situations.

Incarceration or institutionalization normally renders a discriminatee unavailable for employment. When discriminatees take vacations, travel, attend to personal concerns or otherwise appear to be unavailable for employment, the circumstances of the case must be evaluated.[104]

[103] *Tuv Taam Corp.*, 340 NLRB 756 fn. 4 (2003).
[104] See, for example, *L'Ermitage Hotel*, 293 NLRB 924 (1989).

A withdrawal from the labor market is characterized by a cessation of efforts to seek employment. Thus, a withdrawal from the labor market should constitute a failure to mitigate as well and should be determined in the same manner. Section 10558.3.

10560.9 Retirement

If a discriminatee has retired and has withdrawn from the labor market by ceasing further efforts to seek employment, backpay should be tolled. However, application for or receiving Social Security or other retirement benefits does not necessarily establish a withdrawal from the labor market.[105]

10562 Investigation of Backpay When Discriminatees Are Missing

10562.1 Overview

Even when discriminatees are missing or unavailable, backpay should be determined at appropriate times during the pendency of unfair labor practice proceedings. It is very important that the Compliance Officer maintain contact with discriminatees from the earliest phases of unfair labor practice proceedings, as the absence of a discriminatee will complicate determination of backpay issues and may delay full resolution of a case. See Section 10508.8 for procedures to follow to establish and maintain contact with discriminatees at the time a complaint issues.

Where contact has been lost or where discriminatees are only identified later in the course of proceedings, strenuous efforts should be made to locate them. Section 10562.2 discusses methods and resources that may be used in locating missing discriminatees. Subsequent sections discuss procedures to use in resolving unfair labor practice cases when discriminatees cannot be found or are unavailable.

10562.2 Resources Available for Locating Missing Discriminatees

There are many methods for finding discriminatees. The most promising methods in a particular case will depend on the circumstances of the case. The following are among methods and resources available for finding missing discriminatees:

Employer records. Employer personnel and payroll records should include a last known address. Employment applications and other personnel records may include references or names of other individuals who could help locate a person. Employer records should also include a social security number, which is helpful to pursue other search methods, as discussed below.

Form NLRB-916. The NLRB claimant identification form should be mailed to all discriminatees at the time the complaint issues. Section 10508.8. The form asks discriminatees for names of individuals who will be able to help locate them in the future.

Private data service. The NLRB maintains a flat-rate contract with a private database service (presently AutoTrak) to provide address information for individuals. This service collects information on individuals from credit applications and reports and has proven useful in providing address information quickly at a low cost. The Division of Operations-Management issues periodic memoranda regarding the current provider of this service, procedures for using it and training. The Region is responsible for deciding

[105] See, for example, *Roman Iron Works*, 292 NLRB 1292 fn. 3 (1989). *Hansen Bros. Enterprises*, 313 NLRB 500, 608 (1993).

which employees in the Region, in addition to the Compliance Officer, will be provided with a password to access this service.

Coworkers, witnesses. Contacts made during the unfair labor practice investigation are sources of information in locating missing discriminatees.

Unions, other associations, licensing boards. If the discriminatee was a member of a union or other association, or worked in an occupation that required some form of licensing, these are sources of information.

State employment departments. Most states have a department that is responsible for assessing unemployment taxes and for administering payment of unemployment benefits. They can often provide address information on an individual based on recent employment or receipt of unemployment benefits. The information required by these departments to search their records, such as discriminatee name and social security number, as well as procedures for submitting a request for information, varies; Compliance Officers should inquire with the appropriate state employment department.

State Motor Vehicle Departments. Most State Motor Vehicle Departments maintain address information based on vehicle registration or driver's licenses. Again, policies regarding information requests and identifying information needed to respond to a request vary; Compliance Officers should inquire with the appropriate state office.

The Social Security Administration. The Social Security Administration (SSA) maintains records of payroll taxes paid by employers on behalf of individuals. Thus, SSA may have information concerning current employers of individuals. SSA also has current address information for individuals receiving a benefit. SSA will forward Agency letters to individuals, care of their current employers, or directly to individuals for whom it maintains a current address.

To use this method to attempt to reach a missing person, an appropriate letter to the individual should be prepared. Such a letter may include information about the case, urge that the individual communicate with the Compliance Officer, note the importance of cooperation, and include a Form NLRB-916 as well as a return envelope. The letter should be enclosed in a blank envelope. Only the individual's name and social security number should be on the envelope.

SSA charges the Agency a nominal fee, billed on a quarterly basis, for each request processed. In order to make certain the Agency is correctly billed, it is necessary to verify the SSA charges. Accordingly, by the 10th day after the end of each quarter, each Region should electronically submit to the Division of Operations-Management an Excel spreadsheet setting forth the name and social security number of each individual for whom the Region requested information in the previous quarter. In the event no requests were submitted to SSA, an e-mail to this effect should be forwarded to the Division of Operations-Management.

The Internal Revenue Service. The Internal Revenue Service (IRS) will also forward letters to discriminatees if it has an address on its records for that individual. Under its confidentiality policy, IRS will not provide the NLRB with an individual's

address, nor will it advise the NLRB whether it had an address or whether any letter it forwarded was returned.

To attempt to reach a missing individual by requesting that IRS forward a letter, an appropriate letter should be prepared and addressed to the individual. That letter should contain, in addition to information concerning the case and the importance of communicating with the Region, the following paragraph:

> In accordance with current policy, the Internal Revenue Service (IRS) has agreed to forward this letter because the National Labor Relations Board does not have your current address. The IRS has not disclosed your address or any other tax information and has no involvement in the matter aside from forwarding this letter.

The letter should be placed in a blank envelope, with only the name and social security number of the individual on it. The letter should be accompanied by a cover letter to the IRS requesting that the enclosed letter be forwarded based on its address records. When the request is to forward letters to more than one individual, the cover letter should list all individuals to whom letters are to be forwarded, with the list in sequential order by social security number, not alphabetically by name.

If a Region is requesting that IRS forward letters to fewer than 50 individuals, the request should be submitted to the district director of the Internal Revenue Service, to the attention of the disclosure officer, for the IRS district in which the Region is located. See www.irs.gov. On this website, conduct a search for Policy Statement P-1-187.

If a Region wishes to request that IRS forward letters to 50 or more individuals, the Region should obtain clearance from the Division of Operations-Management before submitting it. If clearance is granted, the request should be submitted to Internal Revenue Service, Office of Government Liaison and Disclosure, CL:GLD Room 1603, 1111 Constitution Avenue, N.W., Washington, D.C. 20224.

IRS, although willing to forward letters to individuals for whom it has address information, asks that its service be considered only as a last resort. Prior to submitting a request involving 50 or more individuals, Regions should consider communicating with the IRS Disclosure and Security Division to ascertain the time required to process a request and other considerations that might affect a decision to submit the request. See www.irs.gov. On this website, conduct a search for Project 753, Computerized Mail-Out Program.

Newspaper advertisements. On rare occasions, newspaper advertisements may offer a useful means of locating missing discriminatees. The Region should consult with the Division of Operations-Management as to how to obtain funds for the advertisements.

10562.3 Tolling Backpay When Discriminatees Are Missing

The backpay period may be suspended when a respondent establishes that it has made a reasonable effort to locate and offer reinstatement to a discriminatee that it cannot locate.[106] The backpay period may resume and standard reinstatement requirements will remain, at such time as the discriminatee is located. Section 10534.7.

[106] See, for example, *Bodolay Packaging Machinery*, 271 NLRB 10 (1984).

10562.4 Determining Backpay for Missing Discriminatees

Even when discriminatees are missing, backpay should be determined when respondents wish to settle a case or comply with a Board order, when compliance proceedings must go forward or at any time it is appropriate to determine backpay in order to resolve a case. It is particularly important in cases involving more than one discriminatee that resolution of the case not be impeded for the discriminatees who are available by the fact that other discriminatees cannot be found.

Although the discriminatee should provide information used in determining gross backpay, a reasonable determination of gross backpay may be possible based on gross employer records and other witnesses.

In cases involving a number of discriminatees, it may be established that a missing discriminatee is comparable to other discriminatees for determining gross backpay.

It will be unlikely that interim earnings and related issues can be fully determined without contact with the discriminatee. For purposes of resolving cases, two methods of establishing interim earnings are available. In cases involving a number of comparable employees, an estimate of interim earnings may be based on the average interim earnings of other discriminatees, or on an estimate derived from the use of statistical sampling. If comparisons with other discriminatees seem inappropriate or if the number of discriminatees is too small to support the use of one of these methodologies, interim earnings may be estimated as 35 percent of gross backpay.

See Section 10592.9 regarding settlement of backpay in cases involving missing discriminatees.

See Sections 10648.7 and 10662.7 regarding treatment of missing discriminatees in a compliance specification.

See Section 10582.3 regarding escrow of backpay in cases involving missing discriminatees and Section 10584 regarding the eventual extinguishment of a missing discriminatee's backpay entitlement after compliance is otherwise achieved.

10562.5 Procedures for Determining Backpay Due Uncooperative Discriminatees

Should a discriminatee refuse to cooperate, it must be remembered that the remedies afforded by the Act are public rights, not private. Enforcement of the Act cannot be frustrated by the whim or preference of individual discriminatees. When appropriate, backpay due an uncooperative discriminatee may be determined using the same methods as for missing discriminatees, set forth in Section 10562.4.

In some situations, noncooperation may appear to be a concealment of interim earnings. Section 10550.5.

See Section 10592.10 regarding settlement of cases involving uncooperative discriminatees.

See Sections 10648.7 and 10662.7 regarding treatment of uncooperative discriminatees in compliance proceedings.

10562.6 Procedures for Determining Backpay Due Deceased Discriminatees

Backpay should be determined for a deceased discriminatee. Gross backpay may be determined using the appropriate method and information available from the gross employer or other sources. Even though death tolls the backpay period, any life insurance or death benefit provided by the gross employer will be a component of gross backpay.

A death certificate may generally be obtained from the health department of the county in which the death occurred. Death certificates generally contain information which can be used to communicate with the next of kin. Next of kin may be able to provide all information and documentation required to determine interim earnings, mitigation, and availability for employment issues, as well as information concerning the deceased discriminatee's estate which will be needed in order to make payment of net backpay.

Form NLRB-4181, Authorization to Social Security Administration to Furnish Employment and Earnings Information of Decedent, may be used to obtain an earnings report from the Social Security Administration. Form NLRB-4181 must be completed and signed by appropriate next of kin and should be submitted, with a covering memorandum, to the Director in Charge of Accounting Operations, Social Security Administration, Baltimore, Maryland 21235.

Section 10576.6 sets forth procedures for distributing backpay due a deceased discriminatee.

10564 Net Backpay

10564.1 Overview

Net backpay is the amount of backpay a respondent must pay a discriminatee. The challenge in calculating net backpay is determining all components of gross backpay, including appropriate offsets resulting from interim employment, and resolving issues of mitigation, tolling, and availability for employment.

10564.2 Allocation to Calendar Quarters

Net backpay is calculated on the basis of calendar quarters. To determine net backpay, all gross backpay, expenses and interim earnings offsets must be allocated to calendar quarters within the backpay period and a net backpay amount calculated for each quarter. Total net backpay in a case is the sum of net backpay as calculated for each quarter.

Because backpay is determined on the basis of calendar quarters, earnings that have been documented on an annual basis must be allocated to calendar quarters. For example, W-2 forms and social security earnings reports provide earnings information on an annual basis. To allocate total annual earnings to calendar quarters, it may be appropriate to attempt to confirm employment dates and quarterly earnings with employers. Where this is impossible or impractical, a reasonable allocation may be made on the basis of approximate employment dates provided by the discriminatee.

Several Regions have developed spreadsheet and database programs that are very useful in calculating and summarizing net backpay and interest. Compliance Officers and other Board agents responsible for calculating backpay are strongly encouraged to become familiar with the use of spreadsheet and database software as an efficient means of calculating and presenting backpay determinations.

10564.3 No Carryover of Offsets

No net backpay is due in any quarter in which offsets from interim earnings equal or exceed gross backpay. Offsetting interim earnings that exceed gross backpay in any quarter are not applied against gross backpay due in any other quarter. For example, a discriminatee was unemployed for the remainder of the quarter in which he was unlawfully discharged. The following quarter he obtained interim employment that paid substantially more than he had been earning from the respondent prior to his discharge. A year later, the respondent offered him reinstatement, ending the backpay period. His total earnings from interim employment exceeded total gross backpay accrued throughout the backpay period. Since net backpay is determined on a calendar quarterly basis and interim earnings in excess of gross backpay within a quarter are not applied against gross backpay accruing in other quarters, the discriminatee in this case is due backpay only for the quarter in which he was discharged. *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

10564.4 Determining Backpay When the Backpay Period Has Not Ended

The backpay period is normally ended when the discriminatee has been offered reinstatement to his or her former position. See Section 10530 for a full discussion of reinstatement and tolling of the backpay period. In many cases, it will be useful to make a current assessment of backpay liabilities even though the backpay period continues. In these situations, the parties should be apprised of current net backpay. In many cases, it will also be useful to advise the parties of the current rate of accrual of additional net backpay. When a respondent is acting to comply and offers reinstatement to a discriminatee, it is generally appropriate to calculate net backpay through the tolling date. The Compliance Officer must also confirm that reinstatement has in fact been offered and that the end of the backpay period has been properly reached.

10566 Interest

Interest is charged on net backpay and other monetary liabilities due in an unfair labor practice case. It is the Compliance Officer's responsibility to determine the interest amount due. Some Regions have developed spreadsheets or databases to assist the Agency with the calculation of interest. In addition, the Agency's intranet site has an interest calculation program available. Spreadsheet formats allow for clear presentation of backpay and interest amounts on a calendar quarter basis, for quick and accurate updating of total interest rates and for summing total net backpay and interest amounts. Regions are encouraged to calculate interest using these tools.

Occasionally a party asks how interest has been determined. The following sections provide an explanation of the calculation of interest.

10566.1 Calculation of Interest

The amount of interest charged is based on the amount of backpay due, the length of time for which it has been due, the interest rates in effect during that period of time, and the method of applying those interest rates.

10566.2 Interest on Backpay is Not Compounded, But Charged as Simple Interest

The total interest rate charged on backpay due is the sum of the rates in effect over the period of time for which interest is charged.

For example, net backpay of $10,000 is due for the fourth quarter of 2001. At the end of 2002, a year has passed since the backpay was due. The interest rate in effect throughout 2002 is 6 percent. The total interest rate as of the end of 2002 is thus 1 year at 6 percent per year or 6 percent. The interest amount due at that time is thus $600.

10566.3 A Different Interest Factor is Used for Each Different Calendar Quarter of the Backpay Period

Net backpay is determined for each calendar quarter of the backpay period. Section 10564.2. Interest on net backpay is charged commencing with the last day of the calendar quarter in which net backpay is due until backpay has been paid. Thus, a different total interest factor must be calculated for every calendar quarter of the backpay period. The total interest amount due on net backpay due for all quarters of the backpay period is the sum of the interest amounts calculated for each calendar quarter.

Extending the above example, net backpay of $10,000 is also due for the first quarter of 2002. The backpay period ended at that time. At the end of the fourth quarter of 2002, the total interest rate charged on backpay due in the first quarter of 2002 is three-fourths of the annual interest rate of 6 percent, or 4.5 percent. The interest amount due at the end of 2002 on backpay due for the first quarter of 2002 is $450.

The total interest amount due at the end of 2002 on the total backpay of $20,000 is the sum of the interest amounts due on backpay for the fourth quarter of 2001 and the first quarter of 2002, or $1050.

10566.4 The Interest Rate in Unfair Labor Practice Cases is the Varying Rate Assessed by the Internal Revenue Service on Underpaid Taxes:[107]

The rate has changed greatly over recent years; the Division of Operations-Management regularly issues memoranda providing the most recently established rate. The following chart recites interest rates and the periods of time during which they have been in effect from October 1, 1994 through September 30, 2005:

[107] *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Effective Period	*Annual Percentage Rate*	*Quarterly Percentage Rate*
October 1, 1994 to March 31, 1995	9	2.25
April 1, 1995 to June 30, 1995	10	2.5
July 1, 1995 to March 31, 1996	9	2.25
April 1, 1996 to June 30, 1996	8	2
July 1, 1996 to March 31, 1998	9	2.25
April 1, 1998 to December 31, 1998	8	2
January 1, 1999 to March 31, 1999	7	1.75
April 1, 1999 to March 31, 2000	8	2
April 1, 2000 to March 31, 2001	9	2.25
April 1, 2001 to June 30, 2001	8	2
July 1, 2001 to December 31, 2001	7	1.75
January 1, 2002 to December 31, 2002	6	1.5
January 1, 2003 to September 30, 2003	5	1.25
October 1, 2003 to March 31, 2004	4	1
April 1, 2004 to June 30, 2004	5	1.25
July 1, 2004 to September 30, 2004	4	1
October 1, 2004 to March 31, 2005	5	1.25
April 1, 2005 to September 30, 2005	6	1.5

10566.5 The Total Interest Rate is the Sum of the Varying Rates in Effect During the Period for Which Interest is Charged

Because a different interest amount is calculated for each calendar quarter, it is generally most convenient to work with quarterly interest rates. For example, net backpay of $10,000 is due for the fourth quarter of 2002. Interest is charged commencing with the last day of the quarter. Thus, as of December 31, 2004, the last day of the fourth quarter of 2004, applying the rates set forth above in Section 10566.4, total interest of 9.25 percent is charged:

First quarter of 2003	1.25 percent
Second quarter of 2003	1.25 percent
Third quarter of 2003	1.25 percent
Fourth quarter of 2003	1.00 percent
First quarter of 2004	1.00 percent
Second quarter of 2004	1.25 percent
Third quarter of 2004	1.00 percent
Fourth quarter of 2004	1.25 percent
Total Interest Rate	9.25 percent

The total interest amount due as of December 31, 2004 on backpay due for the fourth quarter of 2002 is $925.

The total interest rate charged as of December 31, 2004 for net backpay due for the first quarter of 2003 is 8.0 percent, reflecting accrual of interest at the above rates commencing with the last day of the first quarter of 2003.

The total interest rate charged as of December 31, 2004 for net backpay due for the second quarter of 2003 is 6.75 percent, reflecting accrual of interest at the above rates commencing with the last day of the second quarter of 2003.

10566.6 Total Interest Rates Must Be Periodically Updated

The total interest rate is always calculated as of a specific date. The total interest rate charged increases as time passes and must be updated to remain current. Extending the above example, as of March 31, 2005 the total interest rate charged on backpay due for the fourth quarter of 2002 has increased to 10.5 percent, because of the accrual of an additional 1.25 percent interest in the first quarter of 2005. Total interest due on March 31, 2005 for backpay due for the fourth quarter of 2002 is $1050. As of March 31, 2005 the total interest rate charged for backpay due for the first quarter of 2003 is 9.25 percent and the total interest rate charged for backpay due for the second quarter of 2003 is 8.0 percent. As of June 30, 2005 the total interest rate charged for backpay due for the fourth quarter of 2002 has increased to 12.0 percent, with the accrual of an additional 1.5 percent interest for the second quarter of 2005. The different total interest rates charged for different calendar quarters of the backpay period all increased by the same amount at the close of each new calendar quarter. Each increased by the quarterly interest rate in effect during the quarter that just closed.

10566.7 Calculating Interest in the Current Calendar Quarter

When the backpay period has not ended, it is often appropriate to calculate current net backpay and to project the continuing accrual of backpay. It also may be appropriate to calculate interest to a current date within a calendar quarter or to project interest to a date in anticipation of payment of backpay.

Because interest begins to accrue commencing with the last day of the calendar quarter in which backpay is due, interest is not charged on backpay that has accrued or is accruing within the current calendar quarter.

Interest on backpay due for earlier quarters does accrue during the current calendar quarter. Interest due in the current calendar quarter is calculated by the same method set forth in preceding sections, but using a monthly, weekly, or daily interest rate for the current quarter. The monthly interest rate is one-third the quarterly interest rate; the weekly interest rate is one-thirteenth the quarterly interest rate; and the daily interest rate is one-ninetieth the quarterly interest rate. In the above example (from Section 10566.6), the total interest rate charged on backpay due for the fourth quarter of 2002 was 9.25 percent as of December 31, 2004. The interest rate in effect during the first calendar quarter of 2005, beginning January 1, is 1.25 percent per quarter. At this quarterly rate, the monthly interest is .4167 percent, the weekly interest rate is .096 percent and the daily interest rate is .0139 percent. Thus, as of February 1, 2005, the total interest rate charged on backpay due for the fourth quarter of 2002 is 9.6667 percent, reflecting accrual of interest for the month of February at the monthly rate of .4167 percent. As of February 7, 2005, the total interest rate charged on backpay due for the

fourth quarter of 1987 is 9.7627 percent, reflecting accrual of interest for the first week of February at the weekly rate of .096 percent. As of February 8, 2005, the total interest rate charged on backpay due for the fourth quarter of 1987 is 9.7766 percent, reflecting accrual of interest on February 7 at the daily rate of .0139 percent.

Interest is charged on backpay until the date backpay has been paid. With net backpay of $10,000 and a daily interest rate of .0139 percent, the total interest amount increases by only $1.39 per day. When interest is being calculated in anticipation of payment, judgment should be exercised to avoid an excessive expenditure of time to gain a precision that will represent only a small difference in the final amount of interest due. However, available spreadsheet and database programs, interest can easily be projected by entering the anticipated payoff date in the program file.

10566.8 Interest on Other Backpay Liabilities

Board orders may provide for reimbursement of medical expenses, refunds of dues or other forms of monetary liabilities, with interest. When they do, the method of calculating interest is the same as that used for net backpay, set forth in the above sections.

10566.9 Interest on Liabilities to Benefit Funds

The standard provision in a Board order that requires retroactive payments to benefit funds refers to *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979). In addition to basic contributions, that provision requires payments to funds for late contributions based on provisions of the funds themselves or, in the absence of such provisions, to evidence of losses to the funds that are directly attributable to the unlawful withholding of contributions. To charge interest or other fees on benefit fund contributions due, the Compliance Officer must determine what provisions have been established by the benefit fund for such charges. These charges may be applied to the contribution liabilities. In the absence of specific provisions, fund practice or another reasonable assessment of interest lost, may be a reasonable basis for assessing the loss to the fund. Note, however, that although benefit funds often have provisions requiring payment of legal expenses incurred as a result of failure to make timely payment of contributions, the Board will not include payment of these legal expenses in a compliance proceeding.[108]

10568 Sample Backpay and Interest Calculation

Assuming it is May 1, 2005 and a Board order has just issued, finding that John Jones was unlawfully terminated on August 15, 2003 and ordering reinstatement and backpay for him.

Gross Backpay: The compliance investigation establishes that at the time of his termination, Jones was earning $12.50 per hour and working a regular schedule of 40 hours per week. The Respondent offers little or no overtime, but had steady work available from the time of Jones' discharge through the present. It also had a wage freeze in effect until November 15, 2004 when all employees received a $1 an hour wage increase. Based on the above, it is determined that gross backpay due Jones is based on a

[108] *G. T. Knight Co.*, 268 NLRB 468, 470–471 (1983).

projection of his predischarge hourly wage rate and the November 2004 wage increase and weekly schedule, or $500 per week through November 15, 2004 and $540 per week thereafter. For the third quarter of 2003, the backpay period is the 6.5-week period August 16–September 30. Gross backpay due for that quarter is thus $3250. For the current quarter, through May 1, 2005, gross backpay is $2338.

Interim Earnings: Jones has accounted for his interim earnings and availability for employment. He searched for interim employment without success until mid-October 2003. He then obtained employment and through December 2003 earned $6000. He continued with that employment through July 2004, earning $2500 per month, a total of $7500 in the first and second quarters of 2004. His earnings in July 2004 were $3000. On August 1, however, he was injured in an auto accident that was unrelated to his interim employment. He remained disabled until October 1, 2004. He was released for work on that date, but had lost his interim employment as a result of his 2-month absence. On November 1, he began a series of temporary interim jobs earning a total of $3200 through December 31. On January 1, 2005, he obtained regular interim employment paying him $10 per hour and earned a total of $5200 during the first quarter of 2005. At present, his work remains steady, with the same wage rate and a 40-hour workweek, so that he has gross wages of $400 per week.

Expenses: Jones incurred interim expenses of $150 in September 2003 and $100 in October 2003 searching for interim employment. Respondent provided a health care plan to employees without cost to employees. Jones was without medical insurance coverage from his termination until October 1, 2003. During this time he incurred medical expenses of $75, $125, and $310 which would have been covered under Respondent's plan. On October 1, 2003 Jones purchased a medical insurance policy equivalent to Respondent's plan for $150 per month and has continued that policy to date.

Gross backpay, interim earnings, net backpay, the total interest rate, and the interest amount through May 1, 2005, are set forth below.

Yr./ Qtr.	*Weeks*	*Hours/ Week*	*Hourly Rate*	*Gross Backpay*	*Interim Earnings*	*Interim Expenses*	*Net Interim Earning*	*Net Backpay*	*Medical & Other Expenses*	*Total Backpay*	*Interest Rate %*	*Interest*
03/3	6.5	40.0	12.5	3250.00		150.00			75.00 125.00 310.00			
Quarter Total				**3,250.00**		**150.00**			**510.00**	**3,760.00**	**7.16**	**269.22**
03/4	13	40.0	12.50	6,500.00	6,000.00	100.00			450.00			
Quarter Total				**6,500.00**	**6,000.00**	**100.00**	**5,900.00**	**600.00**	**450.00**	**1,050.00**	**6.16**	**64.68**
04/1	13	40.0	12.50	6,500.00	7,500.00				450.00			
Quarter Total				**6,500.00**	**7,500.00**		**7,500.00**		**450.00**	**450.00**	**5.16**	**23.22**
04/2	13	40.0	12.50	6,500.00	7,500.00				450.00			
Quarter Total				**6,500.00**	**7,500.00**		**7,500.00**		**450.00**	**450.00**	**3.91**	**17.60**
04/3	4.33	40.0	12.50	2,165.00	3,000.00				450.00			
Quarter Total				**2,165.00**	**3,000.00**		**3,000.00**		**450.00**	**450.00**	**2.91**	**13.10**
04/4	6.5 6.5	40.0 40.0	12.50 13.50	3,250.00 3,510.00	750.00 1,500.00 500.00 450.00				450.00			

Quarter Total				**6,760.00**	**3,200.00**	**3,200.00**	**1,820.00**	**450.00**	**4,010.00**	**1.66**	**66.57**
05/1	13	40.0	13.50	7,020.00	5,200.00			450.00			
Quarter Total				**7,020.00**	**5,200.00**	**5,200.00**	**1,820.00**	**450.00**	**2,270.00**	**0.41**	**9.31**
05/2	4.33	40.0	13.50	2,338.20	1,832.00			150.00			
Quarter Total				**2,338.20**	**1,732.00**	**1,732.00**	**606.20**	**150.00**	**756.20**		
						TOTAL	**9,836.20**	**3,360.00**	**13,196.20**		**463.68**

With regard to the example, note the following:

Interim earnings exceed gross backpay for 04/1, 04/2, and 04/3, leaving no net backpay for those quarters, but interim earnings in excess of gross backpay for those quarters are not offset against gross backpay from any other quarter. Section 10564.3.

In this example, all calculations have been based on 13-week calendar quarters. Particularly during short backpay periods, it may be appropriate to base calculations on the exact number of weeks or days.

Gross backpay for 04/3 is for 1 month, reflecting Jones' unavailability for work for 2 months during that quarter. Section 10560.2.

Jones' $150 expense searching for interim employment in September 2003 did not increase his gross backpay for that period because interim expenses only offset against interim earnings and do not add to gross backpay. Section 10556. Jones is entitled to reimbursement for medical expenses he incurred during that period and for periods in which interim earnings exceeded gross. Section 10552.4.

Gross backpay is not adjusted during the period of Jones' injury based on sick leave or disability benefits provided by the gross employer. The compliance investigation established that the gross employer provided no such benefit. Section 10544.4.

Jones lost interim employment as a result of his auto accident. Although gross backpay is tolled for the period of his resulting disability, as noted above, the Region determined that his automobile accident was not the result of gross misconduct on his part that would constitute a willful loss of earnings. Section 10558.4.

Net backpay is currently accruing at the rate of $140 per week.

Total interest rates are based on rates set forth in Section 10566.4. For example, interest on backpay due for the calendar quarter 03/3, 7.16 percent, is the sum of the quarterly rates of 1.0 percent in effect for the fourth quarter of 2003, 1.0 percent in effect for the first quarter of 2004, 1.25 percent for the second quarter of 2004, 1.0 percent for the third quarter of 2004, 1.25 percent for the fourth quarter of 2004, 1.25 percent for the first quarter of 2005, and .41 percent for April 2005. The monthly rate for April 2005 is one-third the quarterly rate of 1.25 percent. Interest for each quarter of the backpay period is charged from the last day of the quarter. There is no interest charged for backpay due in the current quarter, 05/2. Section 10566.7. Interest is currently accruing at a weekly rate of .096 percent. The interest amount on net backpay is thus accruing at the rate of $11.96 per week.

10570 Proceedings After Compliance Requirements Have Been Determined

In the course of investigating compliance requirements, the Compliance Officer will communicate with all parties, eliciting respective positions on compliance issues, answering questions, and establishing facts. Although the Compliance Officer will seek cooperation and assistance from the parties, he/she also will make it clear to the parties that the Region is ultimately responsible for determining compliance requirements. From the investigation, the Compliance Officer will reach conclusions as to the compliance requirements of each case. At this point, it is generally appropriate to prepare correspondence in which he/she should advise the parties of these requirements, to avoid misunderstandings as to what they are and to provide both charging party and respondent the opportunity to dispute any conclusion. The correspondence should fully set forth the basis for the conclusions the Compliance Officer has reached, including facts which have been established and arguments considered.

For example, a letter advising the parties of backpay due under a Board order should set forth information concerning gross backpay and interim earnings on which the backpay determination is based. It should include wage rates and work schedules used to calculate gross backpay, as well as the method used. It should present interim earnings, and address any mitigation issues raised. An appropriate sample letter is found in Appendix 7.

After advising the parties of the Region's conclusions regarding compliance requirements, the Compliance Officer should contact the parties to confirm acceptance of the conclusions or identify areas of dispute. The following sections set forth procedures for subsequent actions when compliance requirements are undisputed by the parties, when compliance requirements are disputed by a party and when the respondent fails to comply.

10572 Compliance Requirements Undisputed

When all parties agree with the Region's conclusions regarding compliance requirements, the Compliance Officer is responsible for ascertaining that the requirements have been accomplished and, at the appropriate time, recommending that the Regional Director close the case.

Section 10576 discusses procedures for collecting and disbursing backpay. Section 10706 sets forth procedures for reporting and closing cases on compliance.

10576 Collection and Disbursement of Backpay and Interest

10576.1 Recording Receipt of Backpay or Remedial Reimbursement

In order for the Agency to meet its obligations under The Accountability of Tax Dollars Act of 2002, Regions are required to maintain uniform records describing the receipt and disbursement of checks involving backpay or remedial reimbursement. Each Region should have in place a system to record the receipt of backpay checks and any other reimbursement checks received on behalf of a charging party or discriminatee. Information must be submitted on a quarterly basis to the Finance Branch, with a copy to the Division of Operations-Management, using the form identified in Appendix 8.

The Region's spreadsheet should report the total amount of money and the number of checks delivered to the Region by a charged party or respondent, payable to individual discriminatees or any other entity. Treasury checks received from the Agency Finance Branch that are received by the Region for disbursement should also be recorded. Checks that are sent out and returned to the Region as a result of an incorrect address or other mistake should not be entered into the system a second time. The system should record the number of checks and the total amount of monies received in formal compliance cases, cases involving informal settlements and non-Board adjustments. Checks that are distributed directly from the charged party to the discriminatee or other claimant should not be recorded.

At the end of each quarter, Regions are required to do a physical review of the checks in its possession and report the number of checks, and the total value of checks in the Region on that date to the Finance Branch. For auditing purposes, photo copies of the checks that are present in the Region at the end of the each quarter should be maintained in a separate file.

The Accountability of Tax Dollars Act of 2002 makes it very important to retain an accurate and easily available record of checks that have been disbursed, and confirmation that the money has been properly disbursed. Accordingly, Regions are encouraged to maintain a separate file containing only duplicate copies of the backpay checks, transmittal letters and documents that reflect the amount to be paid for the items listed in the spreadsheet for verification purposes.

10576.2 Standard Procedures for Disbursement of Backpay and Interest Payments

Respondents should be requested to make payments of net backpay and interest due a discriminatee by delivering checks, made payable to the individual discriminatees, to the Region for transmission. (For the circumstances under which respondent may distribute payments directly to discriminatees, see Section 10576.2.) Respondent should be reminded that at the proper time, it should send a W-2, 1099-Misc, or other appropriate tax forms to the discriminatees.

Respondent should withhold FICA, Federal, state, and local income taxes from the wage portion of the backpay amounts. Respondent is solely responsible for the reporting and payment of Federal and state unemployment taxes that may be due on backpay.

See Section 10578 regarding treatment of taxes and withholding from backpay and interest.

The Region should deliver backpay and interest checks personally or mail the checks to each discriminatee with a letter that includes a receipt for the discriminatee to sign, date, and return to the Region acknowledging receipt of the checks.[109] In appropriate situations, the letter should also remind the discriminatee to determine whether he/she has to repay a Federal or state agency for amounts collected during the backpay period or to pay Federal and/or state taxes, as well as remind the discriminatee to

[109] Depending on the amount of the check(s), the Region, for tracing purposes, may wish to consider sending the check(s) by certified mail, return receipt requested.

contact the Social Security Administration to determine the proper quarterly crediting of backpay (Section 10578.4).

10576.3 Direct Distribution by Respondent

The respondent may distribute payments directly to discriminatees, but only on conditions prescribed by the Region. It must provide the Region with receipts or other suitable evidence of payment.

10576.4 Other Methods of Payment

Any other proposed method of payment not in accord with Sections 10576.1 and 10576.2, such as a request by a charging party union that backpay checks be sent to it for distribution to discriminatees, is left to the discretion of the Regional Director.

10576.5 Payment to Discriminatees Not Available to Receive Payment in Person

Appropriate arrangements may be made at the request of discriminatees who do not receive mail to have backpay checks sent to locations they designate. Discriminatees who anticipate being unavailable during the course of unfair labor practice proceedings should make such written arrangements in advance.

See Section 10580 regarding procedures for depositing backpay checks to hold in escrow through the Agency's Finance Branch.

10576.6 Power of Attorney

When checks cannot be successfully transmitted or readily cashed, such as may occur when the discriminatee is in the Armed Forces, payment of backpay may be facilitated by having the discriminatee execute a power of attorney, preferably in advance. In the power of attorney the discriminatee should designate a representative, usually a close relative, to accept payment on his or her behalf. See Appendix 9 for a sample power of attorney form.

The power of attorney should be in duplicate and a copy of the power of attorney should be given to the Region and kept in the case file. The backpay check should be payable to the discriminatee and not the designated agent. The discriminatee should be warned that giving a power of attorney is like delivering cash and the discriminatee may have little or no recourse through the Region if the designated agent absconds or embezzles the money. As a safeguard measure, the discriminatee could strike paragraph (b) from the sample power of attorney form (Appendix 9) and then the designated agent could do little more than hold the check for safekeeping or deposit it in the discriminatee's bank account.

Because of the circumstances under which a power of attorney to collect backpay may be executed and to avoid later contests over its validity, the power referred to in this section should be acknowledged. "Acknowledgment" is a formal declaration by the person executing the power before a proper official that the instrument is the former's act. See Appendix 10 for samples of two forms of acknowledgment, the first being for general use and the alternate form being used only for persons in the military.

10576.7 Amount Due Deceased Discriminatees

The backpay due a deceased discriminatee should be paid to the legal administrator of the estate or to any person authorized to receive such payments under applicable state law.

Before disbursing backpay due the estate of a deceased discriminatee to any individual, the Compliance Officer should obtain a copy of the deceased discriminatee's death certificate and either a copy of the court document appointing the individual as administrator/executor of the estate or, in the event no administrator or executor was appointed, Form 1055, Claim Against the United States for Amounts Due in the Case of a Deceased Creditor, completed by the deceased discriminatee's heir.

10576.8 Lump-Sum Payments, When Net Backpay Due Individual Discriminatees is Not Determined

When backpay has been settled on the basis of respondent's payment of a lump sum and the amount due each individual discriminatee has not been determined at the time of the agreement, the agreement should give broad discretion to the Regional Director to make payment decisions. The following procedure for collection and disbursement may be used.

The settlement should provide for the deposit of the agreed lump sum in an escrow account, preferably one opened through the Agency's Finance Branch. See Section 10580 regarding procedures for establishing and using escrow accounts through the Finance Branch.

The Compliance Officer should determine the proportionate share due each discriminatee. To avoid disputes, it is good practice to obtain an agreement from the charging party and discriminatees concerning shares. The settlement should provide for the full distribution of the agreed-on amount. The Region should try to ascertain an agreement by which the final distribution is at the sole discretion of the Regional Director, thereby avoiding any later disputes regarding distribution amounts. In the event the amount due missing discriminatees cannot be determined or distributed, the settlement should provide for redistribution of unclaimed amounts to discriminatees who have been located and who have not received 100 percent of backpay due.

10576.9 Undistributed Funds Generally Not Subject to Setoff, Liens, Garnishment, Except IRS Levies on Backpay Awards; Washington Notice of Attachment Required

Because a backpay award is made in effectuation of a public policy and has no private character whatsoever until distributed, neither the Agency nor the respondent can be held subject to assignments, liens, garnishments, or other processes before the funds have been distributed.[110] For the same reason, a respondent cannot set off debts owed it by the claimant against its backpay liability[111] and the execution of a release by the claimant to the respondent cannot be binding on the Agency. If a Regional Director or

[110] See, for example, *NLRB v. Sunshine Mining Co.*, 125 F.2d 757, 762 (9th Cir. 1942); *NLRB v. State of Illinois Department of Employment Security*, 777 F. Supp. 1416 (N.D. Ill. 1991), affd. 988 F.2d 735 (7th Cir. 1993); and *Lenz v. NLRB*, 915 F.2d 388 (8th Cir. 1990).

[111] See, for example, *NLRB v. Mooney Aircraft*, 366 F.2d 809, 811 (5th Cir. 1966).

other Region staff member or a respondent is served with notice of a lien or levy or a restraining order of the nature indicated above other than an IRS levy, the Region should advise the initiator of the process of the Agency's policy. If the initiator does not agree to withdraw the process, the Region should inform the Special Litigation Branch and provide details that will enable the Branch to take immediate steps to enjoin the proceeding or otherwise resolve the issue.

10576.10 IRS Levies; Notice of Levy Served on Regional Offices

Based upon Congressional intent underlying the Federal tax law, interpretative IRS case law and the different policy concerns involved when the IRS issues a notice of levy, the Board will honor IRS levies served on a Region where a delinquent taxpayer/claimant is eligible to receive a backpay award.[112] In practice, honoring IRS levies still allows the Agency to effectuate the public policies of the Act, while at the same time furthers the IRS' interest in ensuring efficient tax collection.

1. If a Regional Director or other Region staff member is served with an IRS notice of levy, the Region should advise the Division of Operations-Management of its receipt of the notice of levy and proceed to take the appropriate following action, depending upon the circumstances of the particular case:

(a) In cases where there is a final, nonappealable determination of liability,[113] that is, a final adjudicated order or approved settlement agreement and the backpay award has been liquidated,[114] the Region should contact the Special Litigation Branch for assistance in completing the forms, which involve filling out the back of the notice of levy form and following the directions in paragraph 1(e) below for submitting the check to the IRS. The Region should also send Part 2 of the notice of levy to the taxpayer/claimant. The Region should keep a copy of the notice of levy and backpay check for the Region file. Copies of the notice of levy should also be submitted to the Division of Operations-Management and to Finance.[115]

(b) In cases where there is a final, nonappealable determination of liability, that is, a final adjudicated order or approved settlement agreement, but the backpay award has not yet been liquidated, the Region should contact the Special Litigation Branch for assistance in completing these forms, which involve notifying the contact person listed on the notice of levy, by completing the back of the notice of levy form and indicating that the amount of the backpay award and date of distribution are currently unknown. The Region should also provide an estimated date of distribution, if available. The Region should also send Part 2 of the notice of levy to the taxpayer/claimant as well. The Region should also

[112] Any money owed to the taxpayer/claimant, including backpay, interest, or other reimbursements, is subject to the notice of levy.

[113] In determining what constitutes a "final, nonappealable determination of liability," the Region should follow its usual practice for determining whether liability is no longer being contested. If the Region is uncertain as to whether a particular Board order or Court judgment is "final" and therefore subject to the notice of levy, contact the Special Litigation Branch for assistance.

[114] For purposes of this section, a "liquidated" backpay award includes not only a backpay award determined by a final adjudicated order, but also includes backpay amounts due under a settlement agreement and/or backpay amounts that the parties agree are due.

[115] The Division of Operations-Management will retain a file with copies of levies submitted by Regional Offices.

make a copy of the notice of levy and place a notation in the ROF to alert the Compliance Officer that an IRS levy on the backpay award is pending and that once the award is liquidated and payment is received, the IRS should be paid in satisfaction of the levy. See paragraph 1(e) below for directions regarding submitting the check to the IRS. Copies of the notice of levy should also be submitted to the Division of Operations-Management and to Finance.

(c) In cases where a charge has been filed and/or complaint has issued and there is not a final nonappealable determination of IRS liability, the Region should contact the Special Litigation Branch for assistance in completing the back of the notice of levy form, which involves filling out the back of the notice of levy form, indicating that no backpay award is owed to the taxpayer/claimant yet because there is no final nonappealable determination of liability, and sending the notice of levy form back to the IRS. The details regarding the status of the case, e.g., whether the Region has scheduled a hearing and/or is awaiting an Administrative Law Judge Decision also should be noted. The Region should also make a copy of the notice of levy and place a notation in the ROF to alert the Compliance Officer that if and when liability is determined, and the taxpayer becomes eligible for an award, the Region will advise the IRS office so that another notice of levy can be served on the Region at that time. Copies of the notice of levy should also be submitted to the Division of Operations-Management and to Finance.

(d) In all cases where there is a final nonappealable determination of liability, the Region may advise a respondent employer or union that an IRS notice of levy has been served on the Board to satisfy all or part of the outstanding tax liability of a named taxpayer/claimant. Consistent with Sections 10576.1 and 10576.2, a respondent should be requested to make payment of the backpay award due a taxpayer/claimant by delivering checks made payable to individual discriminatees to the Region. See paragraph 1(e) below for disbursement procedures.

(e) In cases where the backpay amount is less than the amount of the levy, the Region should encourage the respondent to make the backpay check payable to the taxpayer/claimant. The Region should send the backpay check made out to the taxpayer/claimant directly to the IRS office listed on the notice of levy in satisfaction of the levy. In cases *where the backpay check is for an amount more than the taxpayer/claimant owes the IRS*, the Region should encourage the respondent to issue and remit two separate checks to the Board—one made payable to the IRS for the amount of the levy and one made payable to the taxpayer/claimant for the remainder. The Region should send the backpay check made out to the taxpayer/claimant to the taxpayer/claimant and the backpay check made out to the IRS directly to the IRS office listed on the notice of levy in satisfaction of the levy. Alternatively, the Region should encourage the respondent to issue one check payable to the Board for the Agency to

handle the distribution. The Board (through Finance) will then send one check to the IRS for the levy amount and one check to the taxpayer/claimant for the remainder.

2. If a Regional Director or other Region staff member learns that a respondent employer or union has been served with an IRS notice of levy to collect a Board backpay award or if a Regional Director receives an IRS notice of levy or a telephone inquiry from the IRS regarding the service of a notice of levy in a Board case that is not pending in that Region or if there are any other problems or questions that arise in complying with or otherwise handling an IRS notice of levy, the Region should contact the Special Litigation Branch for assistance.

10578 Taxes and Withholding

10578.1 Income Tax Withholding by Respondent Employers

A respondent should treat backpay as wages and make appropriate withholding of payroll taxes. Respondent is responsible for determining proper tax withholding and for submitting proper tax payments and reports to tax authorities as well as for providing tax reports to discriminatees to use in filing their income tax returns. Both parties should be apprised that nonwage elements of backpay, such as interest and reimbursement for medical expenses, are not subject to withholding of payroll taxes. In no instance, however, should the Compliance Officer provide advice to the parties regarding tax matters. Rather, the parties should be referred to the Internal Revenue Service.

10578.2 Social Security Taxes and Withholding by Respondent Employers

The taxes enacted by the Federal Insurance Contributions Act, commonly referred to as the social security or FICA tax, are deducted from employee wages.[116] Employers pay an equal amount in addition. The FICA tax rate has increased over the years, as has the amount of annual wages subject to the tax. If questions arise, the employer should be advised that FICA should be withheld and employer contributions made, at rates and earnings limits in effect at the time backpay is paid. FICA taxes should not be withheld on the basis of former FICA rates in effect during the backpay period. The employer is responsible for withholding correct amounts for taxes due under FICA. Nonwage components of backpay, such as interest, insurance, payments made through retirement plans or medical benefits are not subject to social security tax. However, the Compliance Officer should not advise the parties in these areas. Rather, they should be referred to the Internal Revenue Service.

10578.3 Discriminatees' Obligations Regarding Taxes

Discriminatees should be informed that they are responsible for proper filing of income tax returns and proper payment of taxes resulting from receipt of backpay and interest. It should be emphasized that backpay and interest received, whether from an employer, a union or both, are taxable as income.

[116] *Social Security Board v. Joseph Nierotko*, 327 U.S. 358 (1946) (the Court held that backpay is considered wages for purposes of social security tax contributions).

The discriminatee should receive an itemization of payroll taxes withheld from backpay and, at the proper time, should receive a W-2, 1099-MISC, or other appropriate tax forms from the respondent.

If the backpay award is large, or covers a long backpay period, special tax considerations may apply. A large backpay award may exceed the annual earnings limit for FICA tax and the discriminatee may be entitled to a refund of FICA taxes withheld for amounts in excess of that limit.

The Compliance Officer should advise the discriminatee to contact the Internal Revenue Service for information concerning payment of taxes resulting from receipt of backpay.

10578.4 Allocation of Social Security Credit

The Social Security Administration credits employee earnings by calendar years for purposes of determining benefit entitlements and amounts. A backpay award will be credited as earnings by Social Security for the year in which it was paid. There are situations where it may be advantageous for a discriminatee to have the Social Security Administration allocate earnings from a backpay award to the years of the backpay period.

For example, if a backpay award exceeds the earnings limit for FICA taxes for the year in which it was paid, allocation of the surplus could result in higher future benefits. Also, if a discriminatee had no earnings during a year of the backpay period, allocation of the backpay award to that year could affect the discriminatee's entitlement to social security benefits.

Discriminatees should be advised to consult with the Social Security Administration concerning whether it would be advantageous to seek an allocation of backpay to previous years, and the procedures for doing so. In the event that such an allocation is pursued, the Compliance Officer should cooperate by providing documentation of the allocation of net backpay by calendar quarter throughout the backpay period.

10578.5 Joint Employer-Union Liability for Income and Social Security Taxes and Withholding

A union cannot deduct or withhold Federal, state, or local income taxes except when the union is the discriminatee's actual employer.[117] Therefore, when the employer and union are jointly liable for backpay, the employer shall deduct income and FICA taxes from its share of the backpay award sufficient to cover the entire backpay award, including the union's share, and remit such amounts to the appropriate Federal, state, and local revenue agencies. The employer respondent is also responsible for paying the employer FICA tax on the entire backpay award, including the union's share.

In order to compensate for the additional contributions to be paid by the employer, it may be appropriate to adjust the respective shares of backpay paid by the employer and the union.

[117] *Teamsters Local 249 (Lancaster Transportation)*, 116 NLRB 399 (1956).

10578.6 Union Solely Liable for Payment of Backpay

When a union alone is liable for backpay, the payment is not treated as wages for purposes of income tax withholding. Therefore, no income tax and no FICA tax withholding should be made.[118] The union is responsible for proper reporting of backpay to tax authorities. In this situation, the discriminatee should be advised that it is his/her responsibility to make the necessary payments to the tax authorities.

When a union is an employer in an unfair labor practice proceeding, backpay should be treated as wages for withholding of taxes. The discriminatees are responsible for reporting to tax authorities and paying proper taxes on backpay, whether it is in the form of backpay, interest, or other reimbursements.

10578.7 Lump-Sum Payments and Payments for Missing Discriminatees

When an employer respondent transmits backpay to the Region in a lump sum or for a missing discriminatee to be paid out through the Agency's Finance Branch, it should also include the amount of the employer FICA tax at the rate current at the time of payment. When the lump sum is divided or discriminatees are located, appropriate tax withholding and payments are then made by the Agency to the IRS for both income and social security taxes. Where a lump sum payment constitutes less than 100 percent of the backpay and interest owed, unless the settlement specifically provides that the sum paid includes the employer's share of FICA, such amounts remain the responsibility of the employer and should not be withheld from the distributions made to discriminatees.

See the following sections regarding procedures for holding and disbursing backpay through the Agency's Finance Branch.

10580 Escrow Accounts

10580.1 Overview

Although payment of backpay is normally made as provided in Section 10576.1, it is sometimes appropriate to have backpay paid into an escrow account, where it may be held and from where it may be disbursed to discriminatees.

- Escrow accounts are appropriate when:
- The Region wishes to hold backpay due a discriminatee who is missing or otherwise unavailable to receive it
- A respondent is either incapable of or unwilling to prepare individual backpay checks payable to the discriminatees
- A settlement is based on a lump-sum amount to be paid, with allocation of the amount to individual discriminatees not determined at the time of settlement or
- A bankruptcy distribution must be divided and distributed among discriminatees.

[118] Ibid.

Under no circumstances should backpay checks be made payable to a Board employee. Under no circumstances should an account be opened in the name of a Board employee for use in disbursing backpay.

Regions may submit backpay to the Agency's Finance Branch in order to establish an escrow account. The following sections describe procedures for doing so and for disbursing backpay from the escrow account to discriminatees.

10580.2 Opening an Escrow Account Through the Agency's Finance Branch. Instructions to Respondents

When a Region wants to collect and disburse backpay through a Finance Branch escrow account, Regions are strongly encouraged to arrange the transfer of funds by respondents directly to the Finance Branch by wire transfer. This procedure eliminates mailing delays and the waiting period for checks to clear and ensures that the funds are immediately available for investment or distribution. If respondent is unwilling to wire the amounts owed, it should submit a check to the Region made payable to the National Labor Relations Board.

No deduction of any taxes should be made from the respondent's check. Rather, the amount of the check should reflect all backpay, interest, and other amounts, such as reimbursement for medical expenses, that are due, as well as the Employer's FICA tax share of the wage component of backpay. The Finance Branch will handle withholding of payroll taxes and reporting of income for tax purposes at the time it disburses backpay.

The respondent must also submit its Federal tax identification number, which will be used by the Finance Branch for tax reporting purposes.

In cases with more than one discriminatee, a single check may be submitted for all amounts due.

10580.3 Transmitting Checks to Finance Branch

On receipt of the backpay check from the respondent, the Region should write the unfair labor practice case number on the face of the check and send it to the Division of Administration, Finance Branch, with an accompanying memorandum.

The transmittal memorandum should contain the unfair labor practice case name and number, explain the purpose of the check, how the money was obtained (Issuer of the check, Bankruptcy Trustee, Federal Debt Collection Proceedings, or 10(j)), the identity of the type of award, the approximate number of discriminatees, whether the Region will request disbursement within 30 days of deposit and whether Finance should invest the money. The amount of the check representing the employer's share of FICA taxes should be noted.

The transmittal memo may request that the Finance Branch hold the amount or portions of the amount in escrow. It may also request immediate disbursement of the check, or portions of the check. See Section 10582.1, below, regarding information that must be included in a request for disbursement.

The Region must ensure that the remittance control procedures set forth in OM 92-13 (Appendix 11) are carefully followed. Thus, the check must also be accompanied

by Forms NLRB-5472 and NLRB-5473, for use by the Finance Branch in its procedures for confirming receipt of, tracking and reconciling remittances.

10580.4 Interest-Bearing Accounts Through Finance Branch

The Finance Branch will deposit checks into an escrow account with the United States Treasury. All deposits over $2500 (per case) received by the Finance Branch will be automatically deposited into an interest bearing account unless the transmitting Region specifically requests that they be exempt from investment.[119] The Region should request the Finance Branch to disburse money invested in interest-bearing securities in the manner set forth in Section 10582.

10580.5 Escrow Accounts Established Through Local Private Banks

On occasion, such as when the sum to be placed in escrow is less than $10,000 or the escrow period will be less than 30 days, the use of an escrow account in a local bank has enabled the accrual of interest to increase, if only marginally, the amount of backpay available for the discriminatees.

Use of the Finance Branch escrow accounts is strongly preferable to local bank escrow accounts. Escrow accounts established through the Finance Branch allow the Agency to retain full control over disbursement of money held, avoids problems with insurability and avoids the possibility that the Agency will be considered an employer under IRS regulations.

If the Region believes that it is advisable to have the money deposited in an account at a local bank, the account must be established in the name of the respondent, but withdrawals must be approved by the Regional Director. In such an account, the only responsibility of the Region is authorization for disbursement of backpay.

Local bank escrow accounts should not be used in the following situations:

- When there is concern that the respondent will seek protection under the Bankruptcy Code before backpay has been fully disbursed, because a bankruptcy petition may impede disbursements from the escrow account.
- When the respondent has ceased or will cease operations, because of the potential for a determination by the IRS that the Agency is the employer when the respondent goes out of business.
- When the escrow account will exceed $100,000, the insurability limit established under F.D.I.C. regulations.

In these situations, the backpay escrow accounts established by the Finance Branch must be used.

The respondent employer is responsible for all required payroll transactions, such as preparation of the backpay checks, payment of FICA and withholding taxes to the Internal Revenue Service and preparation of tax and W-2 forms. Local bank escrow

[119] In circumstances where it is apparent the Region will be unable to distribute the money for well in excess of 30 days, Finance should be advised of the anticipated period the funds will be held. This will allow the funds to be invested in treasury bonds with a later maturity date, which may provide a higher rate of interest.

accounts should be established only in banks or other financial institutions where deposits are Federally insured.

To disburse money from an escrow account in a local bank in the name of the respondent, the Regional Director should authorize the release of the moneys to the respondent for issuance of the backpay checks. The respondent should be advised to prepare the backpay checks on the basis of the Compliance Officer's apportionment, making the appropriate tax withholding deductions from the backpay amount and submitting the appropriate taxes and its matching FICA payment to the IRS.

10582 Disbursement From a Finance Branch Escrow Account

10582.1 Procedures for Requesting Disbursement

The Region should request disbursement of money held in an escrow account by submitting a memorandum to the Finance Branch that sets forth what amounts should be disbursed, for what purpose and to whom. More specifically, the memorandum should:

A. Identify each discriminatee to whom a disbursement is to be made and include the discriminatee's social security number and current mailing address. A spreadsheet should be attached to the memo containing the following columns: social security number, first name, last name, address, city, state, zip.

B. State the amount and the nature of the disbursement. That is, it must set forth what amounts, among the disbursement, constitute wages, interest, reimbursement of dues, reimbursement for medical expenses, or other components of backpay. A disbursement to a single discriminatee may constitute more than one component of backpay. This information should be included in the spreadsheet referred to above with the following columns: backpay, interest on backpay, expenses, interest on expenses, medical expenses and interest on medical expenses.[120] Additional columns may be added if necessary.

C. State the amount of employer FICA tax contribution, the employer's Federal tax identification number and the employer's current or last known address. The memo should also state if the employer's share of FICA should be withheld from the amount to be distributed.

D. Identify missing discriminatees and inform the Finance Branch that additional requests for disbursement of the balance of the checks will be submitted as the remaining discriminatees are located.

10582.2 Finance Branch Procedures for Disbursement

The Finance Branch will transmit payment requests to the Treasury Department, using information provided in the Region's memo. At the same time, the Finance Branch will send the Region preprinted envelopes with a Headquarter's return address and the name and address of the discriminatee and a detailed listing of the checks that will be sent from Treasury. The Finance Branch will have Treasury send backpay checks directly to a designated agent in the Region (this should not be the Compliance Officer). The Region will have someone other than the Compliance Officer verify that the checks are

[120] Normally, discriminatees would receive a prorated share of interest earned in the event the escrow amount was invested by the Finance Branch.

made out to a discriminatee who is entitled to the money, as shown on a certified list prepared in the Region. The Region should use the envelopes provided by Finance. Undelivered checks will be returned to the Finance Branch by the Postal Service, in which event, the Finance Branch will contact the Compliance Officer for a new address.[121]

The Finance Branch will withhold and transmit to IRS the appropriate amounts for income tax and FICA from the wage portion of the backpay amount. The Finance Branch will also prepare and mail W-2 or 1099-MISC forms to the discriminatees no later than January 30 of the year following disbursement.

The Finance Branch will not, however, be responsible for calculating or remitting to taxing authorities any amounts owed by the respondent on the backpay for Federal and state unemployment taxes nor will the Finance Branch be responsible for any reporting functions in connection with these taxes. These taxes are solely the responsibility of the respondent and the respondent should be so advised.

The Finance Branch will not withhold any state or local income taxes. Discriminatees should be advised that they are responsible for reporting earnings and making payment of state or local taxes as appropriate.

The Finance Branch will notify the Region when it receives notification from the U.S. Treasury that the check was not cashed within 1 year from the date it was issued. The Finance Branch will also notify the Region when it receives a check that was returned because of an improper address. Upon such notification, the Region should promptly investigate the problem and provide the Finance Branch a correct address as soon as possible.

10582.3 Escrow for Missing or Unavailable Discriminatees

When backpay is deposited in an escrow account pursuant to a settlement agreement, Board order or court judgment, respondent should be instructed to follow procedures set forth in Section 10580.2 in submitting the backpay amount to hold.

See Section 10562 regarding missing discriminatees and Section 10562.2 regarding methods and resources available for locating missing discriminatees. If the amount submitted represents final net backpay due the discriminatee, the Region should follow procedures set forth in Section 10582.1 for disbursing the amount at the time the discriminatee is located or otherwise available.

If the amount held represents gross backpay or the amount of net backpay due the discriminatee depends on further investigation of interim earnings, mitigation, or other issues after the discriminatee has been found, the Compliance Officer should investigate these issues when the discriminatee has been found.

The respondent should be advised of the results of this investigation and of a proposed distribution to the discriminatee from the amount held in escrow. If agreement is reached, standard procedures for requesting disbursement should be followed. If more

[121] This procedure will be used for any case that involves less than 100 checks. For larger cases involving 100 or more checks the Finance Branch will work with the Region to determine the best way to process the disbursements so that the Region will not be overburdened. Request for assistance with cases involving 100 or more checks should be directed to the Chief of the Finance Branch, with a copy to the Region's Assistant General Counsel or Deputy.

is held in escrow than the discriminatee is entitled to, the Region should refund the excess by requesting its disbursement in the form of a check payable to the respondent.

In the event that no agreement can be reached concerning net backpay due the discriminatee, the Region may undertake further compliance proceedings as appropriate depending on the circumstances and the stage of the case. It may be appropriate to revoke an underlying settlement agreement or initiate further compliance proceedings.

10584 Extinguishment of Backpay Entitlement for Discriminatees Missing After a 1-Year Period

Absent compelling circumstances, if a discriminatee is not located within 1 year of the date that backpay is deposited in escrow or within 1 year from the date a Board order becomes final, whichever is later, the escrow amount should be returned to the respondent and the discriminatee's backpay entitlement shall expire.[122] When backpay is paid through installments, the 1-year period will begin when the Region receives the final installment payment.

In an informal settlement agreement, the 1-year period runs from either the date of the approval of the settlement agreement by the Regional Director or the denial of the appeal or expiration of the appeal period in a unilateral settlement, or from the date of receipt of the funds by the Region, whichever occurs later. The settlement should contain provisions for redistribution to located discriminatees if the settlement is less than 100 percent or the return of undistributed funds to the charged party.

10586 Escrow in Cases Involving Bankruptcy

In cases involving bankruptcy proceedings, the total sum allocated by the bankruptcy court should likewise be forwarded to the Region in a check made payable to the National Labor Relations Board. The Region, in turn, will submit the check to the Finance Branch for deposit in an escrow account.

The Region should consult with the Contempt Litigation & Compliance Branch regarding backpay held from a bankruptcy distribution for a missing discriminatee. Section 10670.6.

10588 Procedures for Closing Escrow Accounts

If at the end of the period provided for locating discriminatees some are still missing and there are funds remaining in the account, the Region should:

- return the remaining balance to respondent if there was a full 100 percent payout in the case, or
- redistribute the remaining funds (if there was less than a full payout) to the located discriminatees up to a full payout. If the remaining amount is small,

[122] See *Starlite Cutting*, 284 NLRB 620 (1987), clarifying 280 NLRB 1071 (1986); see also *Groves Truck & Trailer*, 294 NLRB 1 fn. 3 (1989).

the Region should use its discretion as to whether it would be cost efficient to do a second distribution.[123]

When closing the escrow account, the Region should submit a final memorandum to the Finance Branch setting forth the distribution of the remaining balance, either to be returned to the respondent and/or to be distributed to discriminatees whose locations are known.

Before closing an escrow account which was established with money received from a bankrupt respondent, contact Contempt Litigation & Compliance Branch before returning the money to respondent or redistributing the money to discriminatees whose locations are known.

When the balance in the account is to be refunded to the respondent, Finance Branch should be requested to issue a check payable to the respondent and forward it to the Region for distribution with the Region's cover letter closing the case, if otherwise appropriate for closing.

10590 Settlements

10590.1 Overview

The Board and the Office of the General Counsel share a commitment to resolve disputes through negotiated settlements whenever possible. ULP Manual Section 10124.1. Settlements benefit all parties by eliminating the expense and uncertainty of litigation. Settlements conserve Agency resources, effectuate basic goals of the Act and tend to reduce conflict and improve relations. Thus, Regions should pursue settlement of disputed compliance issues in all cases.

Although settlement of disputed compliance issues is desirable, Regions should only make concessions that are warranted by the circumstances of the case. The concept of settlement recognizes that in some cases there are reasonable differences about the amount of the make-whole remedy when comparing the maximum, which may reasonably be claimed for the claimant, and the minimum, which may in good faith be fairly argued by respondent.

10592 Settlement Standards Regarding Backpay

Although settlement of disputed compliance issues is desirable, Regions should only make concessions that are warranted by the circumstances of the case. With regard to backpay, the concept of settlement recognizes that in some cases there are reasonable differences about the amount of the make-whole remedy when comparing the maximum, which may reasonably be claimed for the claimant, and the minimum, which may in good faith be fairly argued by respondent. There may also be legitimate room for compromise with regard to other issues, such as extent of posting and implementation of the status quo ante.

[123] The Region should contact the Contempt Litigation & Compliance Branch if there is any question as to whether a second distribution should be done. Likewise, the Region should contact Contempt if payment was made to the Board through a bankruptcy proceeding.

10592.1 Authority of Regional Directors to Accept Settlements

Backpay is the most frequently disputed, as well as the most complex compliance issue. In all cases (informal settlement of unfair labor practices, administrative law judge's decisions, Board orders or court judgments) Regional Directors have the authority to accept settlements of backpay without authorization from Division of Operations-Management if the terms of the settlement meet the following criteria:

- The backpay computation is based on an appropriate method and the backpay settlement will constitute at least 80 percent of full backpay and interest due.
- All parties, and nonparty discriminatees with significant stakes, agree to the settlement.
- There are neither issues regarding recidivism nor pending unfair labor practice charges that will not be resolved by the terms of the settlement.
- All discriminatees entitled to reinstatement have received valid offers of, or have waived, reinstatement.
- All other compliance requirements have been or will be met.
- The Regional Director believes that the settlement effectuates the purposes of the Act.

10592.2 Authorization Required From Division of Operations-Management

If one or more of the criteria above are not met, the Region must obtain authorization from Division of Operations-Management in order to accept a settlement. When necessary, clearance may be obtained by telephone or electronically. A request for clearance should include the full amount of backpay, the amount to be paid under the settlement, the positions of the respective parties and any nonparty discriminatees, and the Region's recommendation and reasoning for accepting the proposal.

10592.3 Settlement Reached by Some or All Parties

Depending on the stage of the case, the Compliance Officer or other Board agent designated as responsible for the case should take an active role in settlement discussions. Occasionally, a charged party/respondent negotiates directly with a charging party or discriminatee, and arrives at a settlement that it presents to the Region for approval. Even so, the Region should arrive at its own conclusions concerning the acceptability of any proffered settlement, and seek agreement to changes that the Region deems appropriate. It should be kept in mind, however, that the Board retains ultimate authority to approve compliance settlements involving Board orders and that it may accept a settlement reached by the parties notwithstanding an objection from the Region.

In evaluating whether to accept a settlement in the face of a Region's objection, the Board will consider the position of the Region, as well as the following factors:[124]

- Whether the terms are reasonable in light of the violations, the uncertainty inherent in litigation, and the current stage of litigation.

[124] See *Independent Stave Co.*, 287 NLRB 740 (1987); and *American Pacific Concrete Pipe Co.*, 290 NLRB 623 (1988). See also *Longshoremen ILA Local 1814 (Amstar Sugar)*, 301 NLRB 764 (1991), (post-ALJD non-Board settlement).

- Whether all parties, including the respondent, the charging party, and all affected employees agree to be bound by the settlement.
- Whether there is any indication that agreement was reached through coercion, fraud, or duress.
- Whether there is any respondent history of violations or breach of previous unfair labor practice settlement agreements.

10592.4 Settlements Based on Less Than 80 Percent of Backpay

Regions should strive to obtain 100 percent of the backpay that the Region determined to be due or that it would allege to be due if it issued a compliance specification.[125] Any compromise from this standard must be warranted by the facts, law, and circumstances of the case. Even with full agreement by the charging party, discriminates, and other affected employees, the Region must obtain authorization from Division of Operations-Management before accepting a settlement of backpay that represents less than 80 percent of what it has determined to constitute full backpay.

This requirement for clearance does not imply that settlements that constitute more than 80 percent but less than 100 percent of calculated backpay should be routinely accepted. The 80-percent figure constitutes nothing more than a trigger for the need to obtain clearance from Division of Operations-Management and should not be construed as authorizing settlements for less than 100 percent without good cause.

In the event that the settlement falls between 80 and 100 percent of calculated backpay but represents more than minor concessions, the Region should submit to Division of Operations-Management a copy of the closed case report showing the amount computed and the amount collected, along with a copy of any memorandum that the Division of Operations-Management issued authorizing settlement or closure of the case. Generally such authorization should be sought only if all the criteria set forth in Section 10592.1 have been satisfied.

10592.5 Settlement Based on Preliminary Estimates of Backpay

In backpay cases involving large numbers of discriminatees, long backpay periods or other complexities, as well as in any case where expeditious treatment is essential, the Region should prepare an estimate of backpay as a basis for settlement. Normally the computation should account for all pertinent facts and all components of gross backpay. In appropriate cases, the Region may utilize innovative approaches to generate a reasonable assessment of liabilities that may serve as a basis for immediate settlement of the case. For instance, it may be appropriate to use statistical sampling or other means to approximate gross backpay and/or interim earnings,[126] to exclude de minimis claims when many claimants are entitled to relatively small amounts of money[127] and to apply

[125] After the Regional Director has found merit to a charge that involves a make-whole remedy, the Region must compute the amount due and document the basis for its determination in order to consider the appropriateness of a proposed settlement. Absent clearance from the Division of Operations-Management, the only circumstance that normally would excuse this computation is a determination that the charged party is financially incapable of making payment, or that the charging party (or claimant) indicates an unwillingness to cooperate in further proceedings.

[126] The Contempt Litigation & Compliance Branch can provide information about past application of these techniques and guidance regarding their applicability in any case currently being processed.

[127] Generally, this exclusion may apply to claims less than $100. When the Region wishes to apply a higher cutoff, it should first consult with its Assistant General Counsel or Deputy.

equitable rather than exact allocation of shares of a lump sum settlement.[128] The Region should clearly inform the parties if its computations are based on estimates or of any other deviation from standard practice. See Section 10548 for further discussion of these methods.

10592.6 Concessions Based on Mitigation Issues

Respondents frequently contend that a discriminatee has failed to meet his or her obligation to mitigate and that net backpay due should be reduced accordingly. Regions should refrain from resolving borderline willful idleness contentions against discriminatees. See Section 10558 regarding mitigation.

10592.7 Respondent Requests to Question Discriminatees

Respondent's counsel may request, as a prerequisite to agreeing to a settlement, that the Region make discriminatees available for questioning concerning their interim earnings and search for work. The Region should not agree, absent prior authorization from Division of Operations-Management. Among other reasons, this type of investigation can be extremely demoralizing to the discriminatee and is better and more fairly conducted under the judicial safeguards of a hearing. If a respondent approaches a discriminatee directly with a request for information on these subjects, the Region should discourage the discriminatee from responding to respondent's request.

10592.8 Reinstatement

Most cases that involve backpay also require reinstatement. Respondents often propose backpay settlements conditioned upon the discriminatee's waiver of reinstatement. The Region should communicate such an offer but should not encourage a discriminatee to waive reinstatement. Rejection of a valid offer of reinstatement tolls but does not otherwise affect backpay. If, pursuant to a settlement, a discriminatee voluntarily agrees to waive reinstatement, his signed waiver must be obtained clearly in writing.

If a respondent offers a discriminatee more than 100 percent of backpay as an inducement for the waiver of reinstatement, the Region may relay the offer but should make it clear to respondent and discriminatee that it is serving only as a conduit for the offer, and is not advocating a premium above the make-whole remedy for any purpose whatsoever. In the event that respondent and the discriminatee agree to a payment that exceeds a full make-whole remedy, they may memorialize the agreement in a side letter separate from any of the documentation regarding the Agency's remedy. All settlements in which a discriminatee is to receive more than 100 percent must be approved by the Division of Operations-Management.

Occasionally, a respondent will offer convincing evidence of a discriminatee's unsuitability for employment. If such evidence persuades the Regional Director that the settlement need not provide for employment to effectuate the policies of the Act, he or she has authority to approve it after obtaining authorization from the Division of Operations-Management and, in post judgment cases, from the Contempt Litigation & Compliance Branch.

[128] If the parties agree, this might take the form of distribution of equal shares of a lump sum settlement, omission of consideration of interim earnings or other factors normally taken into account, or the use of a formula based on averages or samples.

10592.9 Missing Discriminatees or Claimants

Particularly in cases involving more than one discriminatee, it is important not to delay resolution of the case because the Region cannot locate one or more discriminatees. The Region may calculate the backpay due missing discriminatees using the methods set forth in Section 10562.4.

In cases involving a missing discriminatee, the Region should arrange to obtain backpay in a form that places it in escrow, rather than as a check payable to the discriminatee. See Section 10580 regarding escrow accounts, and Section 10582.3 regarding disbursement of backpay from an escrow account when a missing discriminatee is located. See Section 10584 regarding the elimination of a missing discriminatee's backpay entitlement after the respondent has otherwise fulfilled its compliance obligations.

10592.10 Uncooperative Discriminatees or Claimants

In circumstances where the discriminatee does not cooperate, the Regional Director has authority to compromise or eliminate backpay and to forgo an offer of reinstatement if such resolution results in substantial compliance with a Board order or with appropriate remedial standards. The Region may take this step only if it knows the address of the discriminatee, no evidence suggests that the refusal to cooperate serves to subvert the Board's processes and the discriminatee has been given written notice of the consequences of his or her refusal to cooperate.

10592.11 Discriminatee Waivers and Releases

Respondents may seek to have discriminatees and/or charging parties execute waivers or releases as part of or as an adjunct to, a compliance settlement. In determining the overall acceptability of such settlements, the Region should carefully evaluate the propriety of any waivers or releases, particularly when they could be read to foreclose the filing of unfair labor practice charges in future, unrelated matters.[129]

10592.12 Installment Payments

The Regional Director may accept backpay in installment payments when satisfied that the respondent's financial position would be jeopardized by full immediate payment. See Section 10636 for a detailed treatment of this subject; the requirements of this section should be observed before agreeing to installment payments.[130] As described therein, Regions should normally insist, as a condition of accepting installment arrangements, on such security provisions as are commonly required by creditors in ordinary business transactions to protect against default, insolvency, and bankruptcy.[131] Settlements providing for installment payments should also provide for payment of interest during the installment period. See also Section 10636, with respect to monitoring and investigating a respondent's ability to pay.

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[129] See *Copper State Rubber*, 301 NLRB 138 (1991).

[130] Appendix 12 contains the settlement agreement, Standard Form 4775, and various types of security for installment payment plans.

[131] Although collateral is always desirable to protect against default, a significant down payment against total liability and/or a brief installment payment plan lasting only several months might warrant forgoing security if respondent appears likely to meet its commitments.

As an alternative or in addition to security provisions, installment payment plans create one of the circumstances in which a Region should consider adding default language to the settlement agreement. See Section 10594.8 for a more extensive discussion of default language.[132]

Under Section 547 of the Bankruptcy Code, in certain circumstances a transfer of funds from a charged party within 90 days before it filed a bankruptcy petition can be voided as a preference, resulting in return of the funds to the charged party. If it appears that the charged party's finances are unstable and that bankruptcy may be imminent, it would be prudent to advise any discriminatee who receives a monetary remedy of this possibility.

Protective Restraining Orders

Regions should consult with the Contempt Litigation & Compliance Branch regarding the possibility of obtaining a protective restraining order if it has reason to believe that during the terms of an installment plan:

- Assets have been, or are being siphoned off.
- All income is not being reported.
- Respondent is acting to evade liabilities.

10592.13 Settlements Involving Joint and Several Liability

Generally, in cases involving more than one respondent and joint and several liability, the Region should seek payment on an equal share basis. When the joint and several liability of an employer and union pertains solely to a dues reimbursement remedy and they agree that the union alone shall make the reimbursement, unless there are unusual circumstances, the settlement should be accepted without efforts to obtain payment from the employer.

In cases where one respondent is willing to comply by paying its proportionate share, but the other respondent refuses to comply, the Region should accept the proffered compliance. The Region should condition its acceptance, however, on a stipulation that the complying party will be liable for the remainder due, should efforts to collect the remaining backpay from the other respondent fail.[133] Further, the Region should inform the complying respondent that if it becomes necessary to institute backpay proceedings, it will name the complying party as a party respondent.

If one respondent offers to comply by paying the backpay in full, the Region should accept the offer only after it has made efforts to obtain equal payment from all respondents. The Region may reject the offer if it appears appropriate to pursue payment from the other respondent for any reason. For example, the other respondent may have a history of unlawful conduct, or its payment of backpay may appear to have a more compelling remedial effect in the circumstances of the case.

In the event one respondent becomes insolvent, full payment of the liability from the other respondent is appropriate.

[132] See Appendix 12 for sample default language.
[133] See Appendix 12 for sample stipulations.

10592.14 Settlement Conference

The Region may suggest a conference as a means of resolving disputed backpay issues. To emphasize the importance of settlement efforts, the Regional Director or a designated manager may participate in the conference. At such a conference, respondent's contentions should be carefully assessed and, when they have merit, should form the basis of concessions. There is rarely only one way to approach to backpay computations, and reasonable points made by respondent should be considered in attempting to reach agreement as to amounts due.

10592.15 Settlement Discussions Should Not Delay Compliance Proceedings

Although settlement should be pursued at all stages of unfair labor practice proceedings, the Region should guard against a respondent's or charged party's efforts to delay proceedings in the guise of cooperation. Normally, the Region should make its inquiries in writing and with a deadline to respond. Failure to meet a deadline should lead to a firm and prompt written message from the Region. If respondent demonstrates a clear failure or refusal to comply, the Region should normally recommend enforcement or contempt, as appropriate, within the guidelines set forth in Section 10694.4.

In a formal case (where a Board order has issued) the Region should especially not tolerate unreasonable delay, but rather where settlements are on going, should prepare and issue a compliance specification in accord.

10592.16 Concessions Offered During Settlement Discussions Are Not Binding

In the event settlement fails, settlement discussions conducted by the Region do not bind the Region or the Board.[134] Thus, the Region may withdraw settlement proposals in the face of changing circumstances. When settlement efforts have failed, the Region should seek full backpay in further proceedings. Note in addition, however, that the Region's position on backpay issues should also reflect valid points made by respondent during the backpay investigation and settlement discussions.

10594 Informal Settlement Agreements

Every informal settlement agreement should clearly specify all required remedial actions. As soon as the Regional Director has approved an all-party informal settlement agreement, the Region should send compliance instructions to the charged party. See Section 10506.10 regarding procedures for initiating compliance when the charging party does not enter into an informal settlement agreement.

10594.1 Language and Format

Standard Form 4775 provides the format for Board informal settlement agreements. Memorandum OM 02-44 revised the basic form and presented numerous samples of optional paragraphs and attachments that may be adapted and added to an informal settlement as circumstances warrant.[135] The optional paragraphs and attachments deal with matters such as multiple charging parties, consolidated R and C cases, reservation of specific allegations from the settlement agreement, posting and/or

[134] See, for example, *NLRB v. Armstrong Tire Co.*, 263 F.2d 680, 681–682 (5th Cir. 1959), enfg. in part 119 NLRB 353, 354–356 (1957). See Rule 408, Federal Rules of Evidence.

[135] These forms and samples are available in Appendix 12.

mailing of notices, nonadmissions clauses, joint and several liability, signature box template for multiple charging parties, bankruptcy, default, backpay, installment payments and security, and a sample stipulation to set aside an election.

10594.2 Plain Language Notices

When drafting notice language, the Region should be guided by the Board's goal that the language used in a Notice to Employees communicate clearly and in a straight forward manner to employees.[136] Board notices do not necessarily need the degree of precision found in Board orders because in formal cases, the Board's order spells out legal rights and obligations. In informal settlement agreements, however, no order exists, and the charged party commits to comply with the terms of the notice. Accordingly, Regions need also to be mindful of the possibility of noncompliance, and therefore should ensure that, if appropriate, the settlement agreement may be set aside on the basis of subsequent unlawful conduct that might fall outside the literal meaning of the plain language.

10594.3 Foreign Language Notices

The standard settlement agreement form provides the authority to the Regional Director to require the posting of notices in languages other than English. Therefore, prior to recommending a settlement agreement to the Regional Director for approval, it is helpful to explore the need to post the notice in other languages and to incorporate an express commitment to do so in the settlement signed by the parties.

To conserve Agency resources, Regions should take advantage of translations that have become available as a result of prior cases. Memorandum OM 99-18 provides a list of such foreign language notices and remedial provisions. Memorandum OM 03-86 provides Spanish translations of "plain language" notice provisions. Dos Idiomas-Una Lew, Two Languages–One Law. A Bilingual Guide, which the Agency published in March 2005, provides an additional resource for Spanish translations.

10594.4 Postings by Unions

A charged party union is required to post remedial notices at its place of business. In addition, a charged party union is required to post notices on bulletin boards that it maintains at the employers' facilities. The charged party union also is generally required to return signed and dated notices to the Region to forward to the employer for voluntary posting at the employer's premises. The Region should obtain a sufficient number of signed notices and transmit them to the employer.

10594.5 Mailing of Notices

The Board routinely orders a respondent to mail employees the signed notice if respondent has closed its facility. Where circumstances indicate the need for the mailing of notices, the mailing requirement should be identified and resolved as part of the settlement process. Such issues may include:

- the extent of the mailing (that is, present employees, former employees working on particular dates, or job applicants),

[136] See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and Memorandum OM 02-43. For sample "plain language" notice provisions in English, see OM 03-40.

- who will bear the expense of duplicating and mailing the notices (typically respondent), and
- the verification procedure to insure that notices were mailed in accordance with the agreement (typically a "Certification of Mailing" submitted by respondent confirming date of mailing and list of names and address to which the notices were mailed).

Notice mailing is often necessary in the construction industry because a charged party may not have a place to post at a jobsite and few employees regularly visit the charged party's office. It also often arises when a union has no right to utilize bulletin boards at employer facilities, and few employees whom it represents often go to its office or hall. In that event, a mailing or publishing in the union's newsletter may be appropriate.

10594.6 Expunction of Records

The Board also routinely orders a respondent to remove from its files all references to unlawful terminations of discriminatees and to notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way. Where circumstances indicate that a respondent has communicated its unlawful discrimination of a discriminatee to a third party (particularly a third party that regulates or licenses a profession or provides employment histories of potential employees to interested employers), the expunction of such third party records should be identified and resolved as part of the settlement process. In such cases, respondents should be required to take all reasonable steps within their power to expunge records maintained by a third party where respondent has provided information regarding a discriminatee's unlawful discrimination.

10594.7 Reservation Language

In order to avoid settlement bar problems, a reservation clause is included in the Settlement Agreement Form and in the recommended language for the formal settlement stipulation. ULP Manual Section 10168. The language is designed in part to reserve the right of the General Counsel to litigate other cases that involve alleged presettlement conduct. It also includes an evidence provision to enable the Board and courts to make findings of fact and conclusions of law, but not to alter the related remedy, with respect to settled issues, if such findings and conclusions are necessary to support allegations being litigated. Notwithstanding the breadth of the reservation clause, a circumstance has arisen where the Board concluded that it would not permit the litigation of one portion of a union security clause when another portion of the same clause had been the subject of a settlement.[137] Accordingly, Regions should tailor the reservation language as appropriate. If other matters are pending against the same charged party, the Region should specify that the cases reserved from the settlement "include, but are not limited to, Case(s) _____." Regions may also modify or forgo the reservation clause entirely if that is necessary to effectuate a settlement and no adverse consequences will result. In the event of questions, Region should consult with the Division of Operations-Management or Advice.

[137] See *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993), citing *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978).

10594.8 Default Language

Regions should include the following default language in informal settlement agreements where appropriate, such as when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations, the settlement agreement involves large sums of money and/or installment payments are involved:

(a) Where complaint has issued:

The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent, the Regional Director may reissue the complaint dated [insert date] in this (or these) case(s). The General Counsel may then file a motion for default judgment with the Board on the allegations of the complaint. The charged party/respondent understands and agrees that the allegations of the reissued complaint may be deemed to be true by the Board and its answer to such complaint shall be considered withdrawn. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

(b) Where complaint has not issued:

The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent the Regional Director may issue a complaint in this [these] case(s) alleging that the following actions violate the Act:

[List all meritorious allegations of the charge(s).]

The General Counsel may then file a motion for default judgment with the Board on the above-described complaint that will issue. The charged party/respondent understands and agrees that the allegations of such complaint may be deemed to be true by the Board. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

Default language may not be necessary in the following situations:

- Charging party/respondent has provided security sufficient to guarantee the Board's ability to recover the full amount of backpay owed in the event of noncompliance with the terms of an installment payment plan.
- A formal settlement has been entered into by the charging party/respondent.
- A court judgment has issued liquidating the amount of backpay owed.

10594.9 Display of Nonadmissions Language

Where a nonadmissions clause is included in the settlement agreement, under no circumstances should such language be included in the notice.[138] Side posting of a settlement agreement that contains a nonadmissions clause (ULP Manual Section 10130.8) is discouraged and may constitute noncompliance if the nonadmissions clause is highlighted, circled, or otherwise emphasized.[139]

10594.10 Special Language for Informal Settlements in Cases With Outstanding 10(j) or 10(l) Injunctions

Any 10(j) or 10(l) injunctive order terminates by operation of law upon the Board's final disposition of the case. Occasionally, a respondent will resolve the underlying violations by means of an informal settlement agreement, precluding the

[138] *Pottsville Bleaching & Dyeing Corp.*, 301 NLRB 1095 (1991).

[139] *Bingham-Willamette Co.*, 199 NLRB 1280 (1972). In one circumstance, however, when Respondent had fulfilled numerous other remedial obligations, the Board found that Respondent had substantially complied with the terms of the settlement agreement, and declined to set the settlement aside solely on the basis of a side-posting that cast the agreement as simply a means to save the time and money that Respondent would otherwise have had to spend litigating the issues. *Deister Concentrator Co.*, 253 NLRB 358 (1980).

issuance of Board order in the matter. The language in the settlement agreement form provides that approval will, among other things, constitute withdrawal of the complaint. To ensure that the Agency can argue that the force of the injunction remains in effect until closure on compliance, rather than until approval of the settlement agreement, and thus seek contempt sanctions, Regions must substitute the following language for the final sentence in the paragraph "Refusal to Issue Complaint" in the settlement agreement if it arises in the context of an outstanding 10(j) or 10(l) injunction:

The complaint and any answer(s) in [the captioned administrative cases and numbers] shall be withdrawn only upon closing of these matters on compliance. The respondent agrees not to move to vacate, modify, dissolve, clarify, or alter the injunction decree in [caption and case number of the Section 10(j) or 10(l) decree] on the basis that the settlement agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the Section 10(j) or 10(l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the Section 10(j) or 10(l) decree] will continue in full force and effect for all purposes.

If the Region obtained a Section 10(l) decree prior to issuance of the complaint, it should modify the special language of the settlement to reflect that it will hold dismissal of the charge in abeyance until the case closes on compliance.

In the event that a respondent is unwilling to execute the settlement agreement modified as set forth above, the Region should consult with the Injunction Litigation Branch about whether nevertheless to approve the proposed settlement.

10594.11 Closing Cases on Compliance With Informal Settlements

When the posting period has closed and it appears that the charged party has otherwise complied with the terms of the settlement agreement, the Compliance Officer should notify the charging party by letter of the Region's intent to close the case on compliance. This notification should give the charging party a short period of time, normally 1 week, to raise written objections and provide supporting evidence of non-compliance.

If the charging party does not object or if, after objections, the investigation of them confirms that compliance has been achieved, the Compliance Officer should submit the case to the Regional Director for closure on compliance. The closing process will include:

- **Notification**: The Region should normally notify the parties that the case has closed on compliance. This notification should caution that the closing is conditioned upon continued observance of the terms of the settlement agreement. See ULP Manual Section 10148.4.

- **Report**: The Region should complete and submit one copy of the Region's Closed Case Report, Form NLRB-4582, to the Case Records Unit, with a copy of the dated and signed notice attached. No covering memorandum or other material is required. The remarks section of Form NLRB-4582 may be used to explain any unusual circumstance or any other action not fully reported in other sections of the form.

- **Record**: The Region and the Division of Operations-Management shall record the case as closed as of the date that appears on the Region's Closed Case Report.
- **Exception**: When backpay has been deposited in escrow, notification of closure should be held in abeyance pending disbursement of all backpay.

10594.12 Noncompliance With an Informal Settlement Agreement

When a charged party subject to the compliance requirements of a settlement agreement allegedly engages in continuing or new unlawful conduct, the conduct may constitute noncompliance with the settlement or an independent violation of the Act. Complaints of noncompliance or of new unlawful conduct may be made during active compliance proceedings. Similarly, they may arise after the case has closed on compliance, as provisions of settlement agreements remain in effect even after closure of the case.

If the investigation discloses that the charged party failed to comply with provisions of an informal settlement agreement, the Regional Director will normally withdraw approval of the agreement and issue or reissue complaint.[140] In this event, the Region will need first to be able to establish that the charged party did indeed breach one or more terms of the settlement; it then should pursue the complaint on the basis of the underlying allegedly unlawful actions. The passage of time, of course, can make successful prosecution of the alleged unfair labor practices more difficult. The Region can protect itself against this difficulty by incorporating default language in the settlement agreement that will constitute a waiver of the charged party's right to contest the validity of a related complaint, reserving its right only to defend against the allegation that it breached the settlement.[141] Such language is especially appropriate where the Region anticipates that respondent is likely to be unwilling or unable to fulfill its commitments, or the settlement provides for a substantial make-whole remedy and/or installment payments. Section 10594.7. ULP Manual Section 10152.

10595 Procedures to Follow Upon Issuance of an Administrative Law Judge's Decision

When the General Counsel decides not to file exceptions to an administrative law judge's decision, the Region should immediately obtain the positions of the parties on voluntary compliance.

When the charged party agrees to comply and no exceptions are to be filed, the Region should request in a letter that respondent begin to take steps to comply with the administrative law judge's decision, including, but not limited to, posting the Notice to Employees, offering reinstatement and expunging files. The letter should also ask for any documents that will be needed to calculate backpay or any other monetary remedy.

[140] If the notice contains a provision that "WE WILL NOT in any [other] [like or related] manner interfere with your rights under Section 7 of the Act," the Region should consider setting aside the settlement even if subsequent conduct, though similar, does not violate the letter of one of the explicit provisions of the notice, but constitutes "like or related" conduct. In the alternative, inclusion of the broad Section 7 guarantees below the heading of the notice, followed immediately by the provision "WE WILL NOT do anything to prevent you from exercising the above rights" would also serve this purpose.

[141] See Appendix 12 for sample default language. The Board, by summary judgments, approved similar language in *SAE Young Westmont-Chicago, LLC*, 333 NLRB No. 59 (2001) (not reported in Board volume), No. 01-2328 (7th Cir. 2001), and *Ernest Lee Tile Contractors, Inc.*, 330 NLRB No. 61 (2000) (not reported in Board volume).

Compliance actions taken prior to the Board order, including any period of the notice posting, should be accorded full recognition as compliance with the Board order.

Should the charged party not agree to comply and/or exceptions are to be filed, the Region should:

- Continue to pursue compliance or settlement.
- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party and/or discriminatee regarding the viability of respondent, run a database search (AutoTrak) for respondent and respondent's principals to see if the corporation is in good standing and that affiliated companies have not been formed, and begin an investigation if necessary.
- Maintain contact with discriminatees through quarterly requests for information from which backpay could be calculated.
- Update backpay calculations.

10596 Procedures To Follow Upon Issuance of Board Order

The Compliance Officer should initiate compliance action with its remedial provisions as soon as a Board order issues by:

- Providing respondent with a copy of the Board's order and requesting, in writing, that respondent begin to take steps to comply with the Board's order to implement any of the affirmative provisions, including, but not limited to, posting the Notice to Employees, offering reinstatement, and expunging files. The letter should also ask for any documents that will be needed to calculate backpay or any other monetary remedy.
- Update backpay calculations.
- If possible, negotiate settlement pursuant to remedy ordered by the Board.
- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party and/or discriminatee regarding the viability of respondent, run a database search (AutoTrak) for respondent and respondent's principals to see if the corporation is in good standing and that affiliated companies have not been formed, and begin an investigation if necessary.

10598 Determination of Compliance With an Unenforced Board Order

If the Region determines respondent has fully complied with the Board's Order, a preclosing letter should be sent to the charging party soliciting its position on compliance. If the charging party has no objections, the case should be closed. If the charging party has objections, the objections should be investigated and a Regional determination made. If the Region determines the objections are without merit, the charging party has a right to a compliance determination.

10600 Compliance Determination

Final authority concerning compliance with the remedial provisions of a Board's orders rests with the Board.[142] Regional Directors exercise authority in compliance proceedings as agents of the Board.

Sections 102.52 and 102.53 of the Board's Rules and Regulations provide that a charging party may appeal a Regional Director's determination that a respondent has complied with the remedial provisions of a Board order by filing an appeal with the General Counsel. If the General Counsel denies the appeal, the charging party may file a request for review of that action with the Board.

The appeal procedure is only available to a charging party, and not to discriminatees who are not also a charging party, unless the discriminatee has intervened in the case pursuant to Section 102.29 of the Board's Rules and Regulations. Although nonparty discriminatees lack appeal rights, their interests and wishes should be considered by the Region in determining compliance requirements.

In cases where a respondent contests the compliance requirements determined by the Region and will not comply with them, recourse to the Board in some cases may be available through formal compliance proceedings that lead to a supplemental Board order. Section 10646. In a formal compliance hearing, a charging party has the opportunity to seek remedial relief not included in or at odds with the Regional Director's requested remedies as set forth in the compliance specification.[143]

10602 Issuance of a Compliance Determination

When a charging party disputes the Region's determination of what constitutes compliance, the Compliance Officer should advise the charging party that it has the right to request a written determination by the Regional Director of compliance requirements.

In response to such a request, the Region should issue a letter that includes a concise, self-contained compliance determination, setting forth all facts established during the compliance investigation on which the determination has been based as well as the legal basis for the determination. It may be limited to the compliance requirements that are being disputed by the charging party. The compliance determination shall also contain notification of the charging party's appeal right to the General Counsel within 14 days, and a copy of Form NLRB-5434 Notice of Compliance Appeal.

As with dismissal letters, a copy of the Regional Director's compliance determination should be sent to the Office of Appeals. In the event an appeal is filed, the Region should prepare a comment on the appeal, either specifically responding to the charging party's allegations or noting where in the file the response can be found.

10602.1 Procedures to Follow Upon the Filing of an Appeal of a Compliance Determination

A charging party's appeal to the General Counsel of the Region's compliance determination will be considered by the Office of Appeals. On receipt of a copy of the

[142] *Ace Beverage Corp.*, 250 NLRB 646 (1980).
[143] See *Kaumagraph Corp.*, 313 NLRB 624 (1994).

appeal, or a copy of a letter from the Office of Appeals acknowledging the appeal, the Region should promptly submit the Region's compliance file or its relevant portions. The Region should prepare a comment on the appeal, either specifically responding to the charging party's allegations or noting where in the file the response can be found.

10602.2 Procedures Following the Filing of a Request for Review With the Board

Should the General Counsel deny the appeal of a compliance determination, the charging party may file a request for review with the Board within 14 days.

As noted in Section 10602, if the charging party files a request for review, the record before the Board will normally only consist of the request for review, the Region's letter setting forth its compliance determination, and the Office of Appeal's letter denying the appeal, as well as the Region response (Section 10602.4), if appropriate. Accordingly, the Region's compliance determination should set forth clearly all the facts on which it is based, to ensure that the Board has before it sufficient information to make a decision.

The Region should carefully evaluate the request for review to ensure that the Board has before it sufficient information to rule on the request for review.

10602.3 No New Issues Raised in Request for Review

If the Region concludes that the charging party failed to raise issues not previously considered and discussed in the Regional Director's compliance determination and the General Counsel's denial of the appeal, it should so advise the Board as promptly as possible.

10602.4 New Issues Raised in Request for Review

If the Region concludes that the request for review raises issues not fully discussed in the documents before the Board, it should advise the Board that it will file a response and the approximate date that the response will be filed. The Region's response may be in the form of a memorandum to which public documents may be attached to supplement the existing record. In either case, any response, including attachments, must be served on the charging party, and the Board provided with an affidavit of service.

10604 Determination of Noncompliance With an Unenforced Board Order

The Compliance Officer is responsible for investigating any complaint of non-compliance. The complaining party should be asked to submit whatever evidence is available to support the complaint.

10604.1 Criteria for Filing a New Unfair Labor Practice Charge

Whether a new charge should be filed depends on the circumstances of the case. Unless the matter complained of is clearly encompassed by the compliance requirements of the Board Order, the better practice is to advise the party making the allegation to file a new unfair labor practice charge. The reason is that if the newly alleged unlawful conduct is beyond the scope of the remedial provisions of an outstanding settlement agreement or Board order, unfair labor practice charges to address such new conduct must be filed within the 10(b) period.

10604.2 Procedures When a New Unfair Labor Practice Charge is Filed

If the Region finds merit to a new unfair labor practice charge that may constitute noncompliance with an unenforced Board order, the Region should attempt to resolve the matter and, failing that, determine whether a new complaint is warranted (for example, would a new unfair labor practice proceeding lead to remedies beyond those provided by the existing Board order). In case of doubt, Regions may consult with the Division of Operations-Management as to the propriety of issuing a new complaint. In addition, the Region should consult with Operations concerning whether enforcement proceedings should be initiated with respect to the existing Board order.

10604.3 Procedures When a New Unfair Labor Practice Charge is Not Filed

When an allegation of noncompliance is made without the filing of a new charge, it should be investigated as a compliance matter. The Compliance Officer should advise the parties of the results of the compliance investigation regarding the allegation(s) as well as other compliance requirements. The Compliance Officer should attempt to resolve the allegation(s), along with any other disputed compliance issue, through voluntary settlement.

If settlement efforts fail and if it is determined that the respondent has complied, the case should be closed at the appropriate time. If the charging party objects, see Section 10600 with respect to its right to a compliance determination. If it is determined that the respondent is not complying, enforcement proceedings as set forth in Section 10606 are warranted.

10604.4 Noncompliance With an Unenforced Board Order Originating in Another Region

When the investigation of a charged party's prior history reveals that meritorious allegations also violate remedial provisions of an unenforced Board order that originated in another Regional Office, the Regional Director investigating the new charge should contact the Regional Director from the Region in which the Board order originated and obtain his/her opinion concerning the appropriateness of enforcement proceedings in light of the new charge. The Regional Director investigating the new charge should consult with the Division of Operations-Management concerning the other Regional Director's views and discuss the appropriateness of enforcement proceedings. Authorization from Operations is required before the Region may issue complaint or settle those allegations of the charge that may constitute noncompliance with the Board order.

10604.5 When a Respondent Fails or Refuses to Comply With Provisions of a Board Order, Further Proceedings to Compel Compliance Require Enforcement of the Board Order by a United States Court of Appeals

Such proceedings also provide a means by which a respondent may appeal a Board order. Section 10632, Contempt and Other Post Judgment Proceedings and Section 10646, Formal Compliance Proceedings, set forth procedures for compelling compliance after a circuit court of appeals has entered judgment enforcing a Board order.

10606 Criteria for Recommending Enforcement Proceedings

When a Board order issues, the Compliance Officer should take prompt action to secure compliance. Normally, an enforcement recommendation should be made only after efforts have been made to procure compliance. The Compliance Officer should consider the following factors before deciding to submit an enforcement recommendation.

10606.1 Liquidating Backpay Before Recommending Enforcement

In general, there is no requirement that an unfair labor practice case be enforced before compliance proceedings are initiated.[144] Although enforcement of the underlying Board order is normally sought prior to issuance of a compliance specification, there may be situations where the Region concludes that a compliance proceeding in a Board order case should move forward immediately, although enforcement of the Board order has not been obtained. For example, if respondent is not financially viable and the Region decides to pursue alter egos, successors, personal liability or similar issues, the Region should litigate these issues prior to recommending the case for enforcement. See Section 10508.3. The Region should contact the Division of Operations-Management if there is any question as to whether the Region should proceed to a backpay hearing or recommend the case for enforcement. If a decision to submit the case for enforcement is made, the Region should then consult the Appellate Court Branch before submitting the case.

10606.2 Forgoing Enforcement When Only Compliance Requirements Are Disputed

Although enforcement of the underlying Board order is normally sought prior to issuance of a compliance specification, there may be situations in which respondent may be willing to voluntarily forgo enforcement proceedings where only compliance requirements are disputed. The respondent may dispute compliance requirements of a Board order without contesting the underlying findings that it has violated the Act. Section 10646. Thus, when disputed compliance issues cannot be resolved in such cases, the respondent should be asked to enter into a stipulation that waives enforcement proceedings, while reserving its right to litigate disputed compliance issues in a compliance hearing. See Appendix 13 for a sample stipulation. However, it is not necessary to obtain such a stipulation, if circumstances otherwise warrant issuance of a compliance specification prior to obtaining enforcement of the underlying Board order. Sections 10508.3 and 10606.1.

10606.3 Recommending Enforcement

If it appears likely that a respondent will not comply with the Board's order, enforcement should be recommended. A respondent may demonstrate unwillingness to comply by its response to inquiries, requesting repeated conferences or otherwise delaying. The Region may recommend enforcement of a Board order notwithstanding a respondent's offer of compliance or even the achievement of compliance. For example,

[144] See Board Rule 102.54(b). See also, *Yonkers Associates*, 94 L.P., 340 NLRB 1237 (2003), enfd. 416 F.3d 119 (2d Cir. 2005). In *Yonkers*, the Board stated as follows: "[w]e . . . will not defer the process of this compliance proceeding pending the outcome of a court review of the underlying decision and order."

the Region may conclude that it is appropriate to enforce a Board order against a union arising from unlawful picketing when the union has a history of similar unlawful conduct and the Region concludes that a judgment is appropriate as a basis for contempt proceedings in the event of future unlawful conduct.

10606.4 Respondent's Filing of Request for Review

The respondent may itself initiate proceedings before a United States Court of Appeals by filing a request for review of the Board order, in effect appealing the Board's Decision and Order. In such cases, it is not necessary to submit a recommendation for enforcement because the Division of Enforcement Litigation routinely files a cross-application for enforcement.

10606.5 Charging Party's Filing Petition for Review

When the charging party files a petition for review, the Region should make a recommendation to the Division of Enforcement Litigation as to whether the Division should file an application for enforcement. If the Region concludes that the respondent has complied with the Board order, e.g., the recommendation would be not to file.

10608 Procedures for Recommending Enforcement

The Regional Director is responsible for recommending proceedings to enforce a Board order and for advising the parties that such a recommendation has been made.

10608.1 Submission

The submission should be submitted electronically to the Division of Enforcement Litigation and should include:

- Regional Director's recommendation that enforcement proceedings be initiated.
- Compliance Officer's report which should include:
  - status of respondent's compliance with Board order including copies of pertinent correspondence,
  - status of settlement negotiations,
  - backpay computations, including a brief summary of strengths and weaknesses of General Counsel's case regarding backpay,
  - Database searches (AutoTrak) or secretary of state status report on current viability of respondent and possible disguised continuances, if any.
- Notification to the parties of the enforcement recommendation.
- Current service sheet setting forth names, addresses, and telephone numbers for all parties and counsel.
- Duplicate exhibits and transcripts from the underlying proceedings should also be submitted, separately, under cover of a transmittal slip addressed to: Appellate Court Branch, attention _____, Chief, Litigation Services. The transmittal slip should contain the notation, "Enforcement

recommended." In addition, upon notification of the filing in the Court of Appeals by respondent of a petition for review of a Board order, the Region should also forward its copy of the transcript of the underlying complaint proceeding to the Appellate Court Branch. In cases involving an 8(a)(5) test of Board certification, the Region should also submit the R-case transcript, original exhibits, and the Region's case file, without any witness affidavits, to the Appellate Court Branch.

10608.2 Timing of Submission

Even where investigation and discussion of compliance issues is required, prompt action should be sought so that the Region will normally be able to submit an enforcement recommendation within operational goals following the receipt of the Board order. Section 10692. If there is a dispute over what constitutes compliance, or if the Region regards enforcement as necessary notwithstanding actual compliance, the Region's memo recommending enforcement should cover these issues.

10608.3 Test of Certification Cases

Since these cases are not backpay related and deal with important rights of employees, the Region should make every effort to submit its enforcement recommendation as soon as possible, preferably within seven (7) days following its receipt of the Board's order.

10608.4 Need for Immediate Relief

If circumstances indicate that immediate injunctive relief under Section 10(e) of the Act should be considered, the Region should submit an appropriate recommendation and explanation to the Division of Enforcement Litigation with a copy to the Division of Operations-Management.

10608.5 Filing of Petition

The Appellate Court Branch will be responsible for filing the petition for enforcement with an appropriate United States Court of Appeals and for all further proceedings leading to entry of judgment by the court. Should a respondent file a motion for reconsideration of its order with the Board after enforcement has been recommended, the Region should notify the Appellate Court Branch promptly.

10610 Action Following an Enforcement Recommendation

Neither an enforcement recommendation nor the initiation of enforcement proceedings before a United States Court of Appeals preclude the possibility of compliance with a Board order. To the contrary, compliance may be accomplished at any time during such proceedings, and could be the basis for withdrawal of such proceedings. Even after enforcement has been recommended, the Compliance Officer should:

- Continue to pursue compliance or settlement and consult in a timely manner with the Appellate Court Branch about any change or progress in achieving compliance and/or significant developments in the case. If the case is in court mediation, the Region should refrain from settlement discussions with the parties. It is important at this stage that all settlement discussions with the

Respondent be coordinated by the Appellate Court Branch and that the Compliance Officer assists and works closely with the Appellate Court Branch to facilitate a favorable result.

- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party, discriminatee, and/or periodically conduct database searches (AutoTrak), regarding the viability of respondent and begin an investigation if necessary.
- Maintain contact with discriminatees through quarterly requests for information from which backpay could be calculated.
- Update backpay calculations.

10612 Respondent's Compliance with Board Order After Submission of Enforcement Recommendation

If full compliance is obtained or if the Regional Director wants to recommend a suspension or withdrawal of enforcement action, the recommendation should be submitted electronically to the Appellate Court Branch.

10614 Procedures to Follow Upon Issuance of Court Judgment

Actions to obtain compliance with judgments enforcing Board orders should not await the entry of Mandate. If the court only partially enforces the Board order, compliance should ordinarily be sought immediately with respect to the portions enforced. If respondent seeks certiorari, compliance efforts should not be deterred, unless a stay has been granted. If no stay is granted and respondent refuses to comply, the case should be submitted to the Contempt Litigation Compliance Branch, with a copy to the Division of Operations-Management, to initiate contempt proceedings. See also Section 10692.3. The Compliance Officer should initiate compliance action with its remedial provisions as soon as a court judgment issues by:

- Providing respondent with a copy of the judgment and requesting, in a letter, that respondent immediately initiate steps to comply with the judgment, including, but not limited to, posting the Notice to Employees, offering reinstatement, and expunging files. The letter should also ask for any documents that will be needed to calculate backpay or any other monetary remedy.
- Updating backpay calculations.
- Negotiating compliance pursuant to the remedy ordered by the Court.

10616 Noncompliance With a Court Judgment

If respondent fails or refuses to take action required by a court judgment or engages in conduct that violates the negative provisions of a court judgment, prompt action should be undertaken to ensure compliance:

- In cases where respondent refuses to comply with the clear requirements of the judgment (other than the payment of backpay, where the amount owed

has not been liquidated by court judgment) or raises only frivolous defenses to compliance, contempt proceedings are generally warranted. See for example Sections 10530.7, 10616.2, 10624, 10632.1, and 10646.6.

- In cases where respondent's refusal to comply gives rise to a real dispute regarding its obligations under the judgment, the Region may, where appropriate and subject to the provisions of Sections 10616.2, 10632, and 10646, pursue compliance through issuance of a compliance specification. See Section 10646 regarding compliance issues that should be pursued through a compliance hearing and procedures for issuing a compliance specification and conducting a compliance hearing.

10616.1 Allegation of Noncompliance With Court Judgment

If the Region receives a report of noncompliance with a court judgment, the party making the allegation should be asked to specify the defects in compliance and should be asked to submit whatever evidence is available. If there appears to be merit to the allegation, appropriate investigation should be undertaken, including obtaining affidavit or deposition testimony and documentary evidence, if necessary through the use of Section 11 investigative subpoenas. If the Regional Director determines that compliance has been achieved, the procedures set forth in Sections 102.52 and 102.53 of the Board's Rules and Regulations concerning compliance determinations apply. Section 10600.

If the allegation of noncompliance with an affirmative provision is arguably meritorious and is not resolved voluntarily and expeditiously, the Region should submit the matter by memorandum to the Contempt Litigation & Compliance Branch, with a recommendation whether contempt proceedings are warranted. Section 10632.1. See Section 10632.5 regarding criteria for initiation of contempt actions. A copy of this recommendation should also be submitted to the Division of Operations-Management.

Because a finding of contempt requires clear and convincing evidence (rather than a mere preponderance of evidence), the Region's investigation of noncompliance should include testimonial (affidavit or deposition) and documentary evidence whenever possible. In addition to the initial written requests for compliance following issuance of the judgment, subsequent requests for compliance should be confirmed in writing, including any deadlines for compliance or statements that contempt proceedings may be recommended absent compliance.

If it appears that contempt proceedings may be recommended, the Region should document (by maintaining detailed and contemporaneous records) the time and expenses expended to investigate and prosecute the case in order to recoup such fees and costs in the contempt case. Section 10632.8.

10616.2 Allegation of Noncompliance Clearly Encompassed by Affirmative Provisions of the Judgment; New Charge Not Warranted

If the allegation of noncompliance involves conduct clearly encompassed by the affirmative provisions of the judgment, the filing of a new charge probably will not be warranted. For example, where the respondent has not complied with a notice posting or expunction requirement, the filing of a new charge would not be warranted because such conduct does not amount to a new unfair labor practice. However, if the conduct

complained of arguably may constitute a new unfair labor practice (for example, a subsequent discharge for union activities), the better course of action is to suggest that a new charge be filed in order to avoid possible 10(b) problems should a decision later be made to process the case administratively, rather than through a contempt proceeding. Section 10616.3.

10616.3 Conduct Not Clearly Covered by an Outstanding Judgment; Possible New Unfair Labor Practice

If the conduct comprising the alleged noncompliance may also constitute a new unfair labor practice, the party raising the allegation should be advised of this and of the possibility that unless a new charge is filed, the expiration of the 10(b) period may preclude the issuance of a complaint should a decision be made that the newly alleged violations are not actionable in contempt (for example, because the supporting evidence does not appear to meet the "clear and convincing" standard applicable in contempt actions). A new charge should be requested when the incident that is the subject of the dispute is not clearly encompassed by the terms of the judgment.

The Region should consult with the Contempt Litigation & Compliance Branch if it has any questions in this regard. Of course, the party raising the allegation may, on its own initiative, file a new charge. The investigation of the allegation of noncompliance and of the new charge should proceed simultaneously.

10616.4 New Charges Filed Against a Respondent Subject to an Outstanding Court Judgment; Withdrawal of Charges Against Respondent Subject to an Outstanding Court Judgment

At any time following the issuance of a judgment, charges may be filed that allege unlawful conduct by a respondent that is subject to an outstanding court judgment. When charges are filed, regardless of whether they are accompanied by a specific allegation of noncompliance with the court judgment and regardless of whether the court judgment resulted from charges filed in another Region, the Region should initially determine whether the respondent is subject to a judgment arguably encompassing the charged conduct. If so, the Region should follow these procedures:

If it is determined that the charge has merit and if the conduct is arguably encompassed by the provisions of the judgment (see Section 10632.5) the matter should be submitted to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management. The memorandum should contain a Regional recommendation concerning the appropriate course of action, such as issuance of complaint, institution of contempt or alternative proceedings. See Sections 10632, generally, and 10632.6 regarding the contents of such a memorandum. Any doubt whether the allegation is encompassed by the judgment should be resolved in favor of submitting the case for contempt consideration.

Where a charge appears to be arguably meritorious, and there is an outstanding court judgment against the charged party, the Region should consult with the Contempt Litigation & Compliance Branch before approving any withdrawal request.

When the matter has been submitted to the Contempt Litigation & Compliance Branch, the Region should not issue complaint, approve a withdrawal or settle the case

until the General Counsel has decided whether to recommend, and the Board has decided whether to authorize the institution of contempt proceedings.

If contempt is authorized, the Region should take no action on the matter without the authorization of the Contempt Litigation & Compliance Branch. However, the Region may seek authorization from Contempt to proceed administratively, notwithstanding the Board's authorization of contempt proceedings (for example, when the same facts demonstrate violations of different sections of the Act, only some of which are covered by the judgment or when 10(j) or 10(l) relief is needed).

In cases where a Regional dismissal has been appealed, the appeal has been sustained and the Region has been directed to issue complaint, the Region should submit the case to Contempt Litigation & Compliance Branch.

10616.5 Regional Action: New Charge Not Filed

On the basis of the investigation and any consultation with the Contempt Litigation & Compliance Branch, the Region should take appropriate action. For example, the Region may advise the charging party that the terms of the judgment are being complied with or advise the respondent, with confirmation in writing, of action necessary to remedy the defect. If the Region concludes that the respondent is not complying and all reasonable efforts to achieve voluntary and expeditious compliance fail, the Region should submit a memorandum recommending further action, such as contempt or other alternative proceedings, to Contempt, with a copy to the Division of Operations-Management. Regions are encouraged to confer informally with Contempt before formally submitting cases.

10618 Investigation of Noncompliance Allegations

Because a finding of contempt requires clear and convincing evidence rather than a mere preponderance of the evidence, the investigations of allegations of non-compliance should be especially thorough. Regions should make appropriate use of investigative subpoenas ad testificandum and duces tecum where necessary. Where the witness is cooperative and forthcoming, a voluntarily-given affidavit normally will be appropriate. On the other hand, where it is expected that the witness will be evasive or testify only under compulsion, a subpoena should be issued and a deposition, rather than an affidavit, should be taken. Depositions may also be appropriate where there are tactical reasons for doing so or where it appears that a net saving of Agency resources will be realized. For example, the Region may take a deposition even of a cooperative witness when doing so will increase the likelihood of settlement.

10618.1 Issuance of Section 11 Subpoenas

Regional Directors are authorized to issue Section 11 subpoenas, both ad testificandum and duces tecum, to investigate allegations of noncompliance with a judgment enforcing a Board order. Clearance from the Division of Operations-Management is required only where the Region wishes to issue the subpoena regarding matters covered in a pending (that is, issued but not yet litigated) compliance specification or where a serious claim of privilege is likely to be raised. Regions should maintain a log which may be in electronic format that lists for each investigative subpoena issued:

- the name of the case and the date of issuance,
- the name of the party or witness to whom the subpoena is directed,
- the evidence sought; the date of issuance,
- a brief description of the basis for issuance, and
- a notation of any petition to revoke and/or enforcement proceedings.

Questions as to whether particular conduct or alleged noncompliance falls within the scope of a judgment should be discussed with the Contempt Litigation & Compliance Branch.

If a Section 11 subpoena is directed to a financial institution seeking the records of an individual or a partnership of five or fewer individuals, the subpoena must comply with the notice and procedural requirements of the Right to Financial Privacy Act, 12 U.S.C. Sec. 3401. The Region should consult with the Contempt Litigation & Compliance Branch before issuing subpoenas for such records. However, the Right to Financial Privacy Act does not restrict the Government's authority to issue administrative subpoenas for the financial records of corporations, unincorporated associations or partnerships other than those comprised of five or fewer individuals, or to issue subpoenas under Fed.R.Civ.P. 45 for records of a party to pending litigation. No prior consultation is required in such circumstances.

If the Region has reason to believe that a claim of privilege will be raised as a defense to the subpoena (for example, when the subpoena is addressed to a medical doctor, an attorney, or a news reporter), clearance should be obtained from the Division of Operations-Management prior to issuance.

In accordance with ULP Manual Sections 11770.6, 11790, and 11790.3, subpoena enforcement problems should be reported to the Division of Operations-Management, with a copy to the Special Litigation Branch and the Contempt Litigation & Compliance Branch.

10618.2 Use of Discovery to Investigate Allegations of Noncompliance

Where a supplemental court judgment liquidating backpay has issued, and has been registered in an appropriate U.S. district court, discovery may be conducted pursuant to Fed.R.Civ.P. 69(a), which incorporates the discovery provisions of Fed.R.Civ.P. 26 through 37 and 45. To facilitate Rule 69 discovery, the Region should register the judgment in an appropriate district court or courts under 28 U.S.C. 1963, as expeditiously as possible, normally within five (5) days of receipt by the Region of certified copies of the judgment.

10620 Notification of Regional Determination

Following the Region's evaluation of the situation and, as provided above, consultation with the Contempt Litigation & Compliance Branch, the Region should take appropriate steps to advise the complaining party that the terms of the judgment are being complied with or advise the respondent, with confirmation in writing, of action necessary to remedy the defect. For example, if the Region finds merit to an allegation of non-

compliance with an expungement remedy, the respondent should be notified accordingly and directed to cure the defect. If the Region concludes that the respondent is not complying and all reasonable efforts to achieve voluntary and expeditious compliance fail, the Region should submit a memorandum recommending further action, such as contempt or alternative proceedings, to Contempt, with a copy to the Division of Operations-Management. Regions are encouraged to confer informally with Contempt before formally submitting cases.

10622 Regional Analysis of Compliance With Cease and Desist Provisions; Recidivism; Potential Contempt Issues

Where respondent has violated a cease and desist provision of an enforced Board order, the Region should consider whether the noncompliance or violation constitutes contumacious conduct, even where the conduct is not ongoing and where the respondent has agreed to refrain from further violations in the future.

If after investigation the Region determines that the conduct arguably violates an outstanding judgment, the Region should submit a recommendation about the propriety of contempt proceedings to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management. If the Region is in doubt as to whether to recommend contempt, it should consult telephonically with Contempt especially where the respondent's operations extend beyond the Region's boundaries. Where the conduct appears isolated, where no charge has been filed or where the respondent has expeditiously remedied the violation, the Region need only consult telephonically with Contempt.

Where a new charge is filed, see Sections 10616.3 and 10616.4.

10624 Allegations of Noncompliance in Backpay Cases

On refusal to comply with the backpay provisions of a court judgment, the appropriate course of action by the Region will be determined by the status of the case and the nature of the respondent's backpay liability, considered in conjunction with the Region's assessment of any inability-to-pay defense raised by the respondent, as well as derivative liability issues. See Section 10682 for a discussion of derivative liability. As used in this section, "backpay'' refers to any monetary remedy imposed by the Board.

10624.1 Liquidated Versus Unliquidated Backpay Judgment

The court judgment may enforce a Board order containing a generalized "make-whole" remedy or it may state specific amounts of backpay or other monetary awards due to named discriminatees or other entities, such as a benefit trust fund. The latter form of judgment is usually entered only after supplemental backpay proceedings have been conducted, whereas the former determines liability but leaves the amount thereof for future determination. An unliquidated make-whole order is generally too indefinite to serve as a basis for collection proceedings or to create a judgment lien against the respondent's property. However, in appropriate circumstances (for example, where a respondent is improperly dissipating assets or otherwise acting to render itself incapable of compliance), it may be appropriate to initiate action to obtain pendent lite relief, including a protective restraining order, pursuant to Section 10(j) or Section 10(e) or the

Federal Debt Collection Procedures Act. See Section 10678 regarding collection procedures.

10624.2 Unliquidated Judgment

Where the only judgment in place is an unliquidated "make-whole" judgment, the Region normally should take steps to obtain a liquidated judgment by obtaining a supplemental Board order and then referring it for enforcement. In many cases, such a judgment can be obtained by summary proceedings. In such cases, the Region should attempt to ensure that the Board order set forth on its face the total amount of money due, including interest to as late a date as can be computed, and not simply make reference to an earlier administrative order. However, if it appears, on the basis of investigation, that there is no reasonable likelihood of collection from either respondent or any potentially derivatively liable entity, the Region may submit to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management, a recommendation that the case be closed administratively. Section 10694.9.

10624.3 Liquidated Judgment

In the event respondent refuses to comply with a liquidated judgment, the Region should proceed as set forth below in Section 10678 to undertake collection action. Collection proceedings are the preferred means of achieving compliance with a liquidated judgment.

10624.4 Contempt Proceedings to Compel Payment:

The Region should recommend the institution of contempt proceedings after the issuance of a liquidated judgment to compel payment only if:

- Collection proceedings have failed or would likely prove futile, and circumstances indicate a likelihood of at least some meaningful recovery in contempt;
- The Region has acquired clear and convincing evidence that some person or entity is derivatively liable; and/or
- Respondent has actively evaded compliance through concealment or dissipation of assets, or other exceptional circumstances that warrant proceeding in contempt or under the fraudulent transfer provisions of the Federal Debt Collection Procedures Act (FDCPA).

10626 Financial Inability to Pay Raised as a Defense

A respondent claiming financial inability to comply with the provisions of a judgment bears the burden to show categorically and in detail why it is unable to comply in any way. The Board will need to show at least some ability to comply in order to obtain a meaningful remedy in contempt. Whenever respondent asserts financial inability to pay, the Region should promptly and thoroughly investigate respondent's financial condition, including but not limited to the following:

- a review of financial statements provided to third parties, bookkeeping records such as cash receipt and disbursement journals, banking records (including cancelled checks and deposit instruments), and tax records,

- respondent's assets and encumbrances thereon, and
- any possibility of piercing the corporate veil, setting aside fraudulent conveyances, or otherwise establishing the liability of owners, managers, affiliated entities, or others.

Additionally, the Region should fully investigate and assess the respondent's ability to satisfy its obligations under the judgment by installment payments.

See Sections 10508.5–10508.7 regarding methods and resources for investigating a respondent's ability to pay. See Section 10636 regarding criteria for accepting installment payments.

10626.1 Investigating an Inability to Pay Assertion

Respondents may claim a financial inability to pay backpay or other liabilities arising from unfair labor practice proceedings. In order to facilitate the ultimate satisfaction of backpay liabilities, either through collection or contempt, the Region must be prepared in all such cases to thoroughly investigate respondent's financial condition. See Section 10626 for further discussion of this topic in the context of a post judgment case.

The investigation should consider levels of activity, revenues and expenses in order to evaluate current income or losses. Assets should also be reviewed. During the investigation, the Region should be alert as well for large, unsubstantiated expenses, transfers of assets, or other indications that the respondent is removing assets or seeking to render itself incapable of paying liabilities. Finally, the Region should, as necessary, obtain testimony and documents from all witnesses having relevant information, including respondent's owners, officers, managers, accountants, tax preparers, regulators, customers, and suppliers, where necessary utilizing Section 11 subpoenas, and/or U.S. district court subpoenas issued pursuant to Rule 69 of the Federal Rules of Civil Procedure if a supplemental judgment has been registered in the district court. Sections 10508.5, 10508.6, and 10508.7.

Regions are encouraged to consult with the Contempt Litigation & Compliance Branch to obtain advice and assistance with respect to such investigations.

Based on the results of the investigation and the stage of unfair labor practice proceedings, it may be appropriate to recommend one or more of the following actions:

- Compliance proceedings to fully liquidate respondent liabilities. Section 10646.
- When backpay has already been liquidated in a court judgment, collection proceedings. Section 10678.
- Initiation of contempt proceedings. Section 10632.
- Initiation of injunctive proceedings to protect against the dissipation of assets or the respondent otherwise rendering itself incapable of complying. Section 10674.2.

- Initiation of compliance proceedings to establish derivative liability or to pursue payment from third parties. Sections 10648.3 and 10682.
- Settlement of backpay based on an installment payment agreement. Section 10636.
- Administrative closure of the case, based on the conclusion that the respondent is defunct and totally incapable of paying any liabilities. Section 10694.9.

10626.2 Determination of Inability to Pay

If the Region is satisfied that the respondent has no assets available and that there are no other potential sources for obtaining satisfaction of the judgment, and the case is otherwise appropriate for closing, the Region should submit the matter to the Contempt Litigation & Compliance Branch with a recommendation regarding closing the case, using procedures set forth in Section 10694.9, with a copy to the Division of Operations-Management.

10626.3 Determination of Ability to Pay

If, after investigation, the Region determines that respondent has sufficient assets to satisfy or partially satisfy its liability and the amount of the backpay or other financial obligation has not yet been liquidated, the Region should immediately proceed to obtain a supplemental Board order and judgment liquidating the amounts due. Section 10646. Where the circumstances so warrant, the Region should take appropriate steps to obtain interim relief under Section 10(j) or prejudgment relief under 10(e) or Section 3101 the FDCPA. Section 10676. Upon the issuance of a supplemental judgment, the Region should undertake collection action as set forth in Section 10678.

10626.4 Inability to Make Determination

In the event that the Region is unable to determine whether assets are available, unless it appears that there is no realistic prospect of recovering from the respondent or any potentially derivatively liable entity, the Region should initiate or continue backpay proceedings to obtain a liquidated judgment. While backpay proceedings are going forward, the Region should continue to investigate to determine the respondent's financial condition and to identify assets from which the judgment can be satisfied. Investigation should be conducted to uncover any concealed or fraudulently transferred assets and to identify additional entities or individuals that may potentially be held liable for backpay. An investigation may be conducted regarding third parties, insofar as it relates to the existence or transfer of the respondent's assets and other bases for imposing derivative liability, as well as potential garnishees to satisfy the monetary judgment. Should the Region at any time identify an additional party or parties that potentially may be liable for backpay, the Region should consult with the Contempt Litigation & Compliance Branch to promptly and fully consider the efficacy of naming such parties as additional respondents in contempt or other appropriate proceedings. (Should the Region determine it is necessary to add additional respondents to a backpay proceeding, it may consult with Contempt.)

10628 Noncompliance Assertions Relating to Reinstatement

In the event an allegation of noncompliance or any controversy involves a reinstatement issue, the Region should investigate the matter. Absent expeditious and satisfactory resolution of the issues, the Region should submit the case to the Contempt Litigation & Compliance Branch, and provide a copy to the Division of Operations-Management, with a recommendation as to whether contempt proceedings are warranted to achieve compliance with the Board's reinstatement order. Examples of reinstatement issues include: discriminatee has not received a valid offer of reinstatement from the respondent; discriminatee has not been validly reinstated by the respondent; or the respondent refuses to offer reinstatement for discriminatee based on asserted lack of work or unfitness of discriminatee to work.

As noted in Section 10530.7, the matter should be submitted even when there appears to be a legitimate factual or legal controversy surrounding the reinstatement issue. Where the facts clearly show insufficient basis for initiating contempt proceedings, telephone consultation with the Contempt Litigation & Compliance Branch may suffice.

In such cases, the Region should continue to conduct whatever investigation is necessary in order to compute backpay and to prepare a compliance specification. However, the Region should defer issuance of a compliance specification until the General Counsel has decided whether to recommend, or the Board has decided whether to authorize, contempt proceedings.

10630 Responsibility for Supreme Court Proceedings

In the event that a United States Court of Appeals judgment fails to enforce a Board order in whole or in part, the decision as to further action, including Supreme Court action, will be made by the Board with the recommendation of the General Counsel. The Region will be advised of the decision and will then advise the parties.

10632 Contempt and Other Post Judgment Proceedings

10632.1 Contempt Overview

When a respondent fails or refuses to comply with either the affirmative (other than backpay, where the amount has not yet been liquidated by a court judgment) or negative (cease-and-desist) provisions of a court judgment (Sections 10616.1 and 10622), or when the Region concludes that new charges alleging conduct arguably encompassed by the provisions of a court judgment have merit (Sections 10616.1 and 10616.2), the Region should submit the matter to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management, with the Region's recommendation as to whether contempt proceedings should be instituted. For backpay cases and reinstatement issues, see Sections 10624 and 10628.

10632.2 Contempt Instituted by Private Parties

No court has ever permitted a private party to institute contempt proceedings to compel compliance with a judgment enforcing a Board order. Accordingly, whenever a party to the case has filed, or indicates that it intends to initiate its own contempt proceedings with the court, the Region should immediately notify the Contempt Litigation & Compliance Branch, with concurrent notification to the Division of Operations-Management.

10632.3 Notice to Parties

Before recommending the institution of contempt proceedings, the Regional Director should normally notify the respondent of the Region's contempt recommendation. However, discretion should be utilized: there are clearly some circumstances that make such notice inadvisable, such as when there is a substantial risk that the respondent, if notified of the possibility of contempt proceedings, will dissipate assets. If the Region is uncertain whether to provide such notice, it may consult with the Contempt Litigation & Compliance Branch.

10632.4 Compliance Developments After Submission of Contempt Recommendation

Any substantial change or progress with respect to compliance following the Region's submission of its recommendation regarding contempt should promptly be reported to the Contempt Litigation & Compliance Branch, and confirmed promptly by memorandum.

Whenever contempt or other ancillary proceedings have been recommended or are pending and a new charge is filed against the same respondent or a related party, the Region should immediately notify the Contempt Litigation & Compliance Branch and the Division of Operations-Management. If the charge is meritorious, the Region should act on it in the manner set forth in Section 10616.4. If the Region determines that such a charge is not meritorious, the Region should notify Contempt by memorandum, with a copy to the Division of Operations-Management, of its determination and supporting reasons before advising the parties of its determination and its intention to dismiss the charge.

10632.5 Criteria Governing Choice Between Contempt or Further Administrative Proceedings

Each case, of course, should be judged on its own merits. Although no single factor discussed below should be considered conclusive; the Region should evaluate each in determining whether to recommend the institution of contempt proceedings. The Region is encouraged to consult informally with the Contempt Litigation & Compliance Branch before formally submitting a case.

10632.5(a) Whether the Alleged Violation is Covered by the Judgment

An enforced Board order is in the nature of an injunction, enforceable by contempt proceedings in the issuing court. Enforced cease-and-desist orders are not limited in their duration and there is no limitations period within which an action for

contempt must be brought. The initiation of a contempt proceeding does not reopen for reconsideration the validity of the underlying order.

A narrow (like or related) cease-and-desist order will ordinarily encompass any future conduct that violates the subsections of the Act involved in the underlying case. On the other hand, a broad (in any other manner) cease-and-desist order may reach all future violations. In addition, Board orders are generally considered to be limited in geographic scope, at least in the absence of some explicit statement to the contrary. Finally, conduct may fall outside the subsections involved in the underlying case and yet still violate a like or related order, for example, where an employer attempts to undermine a bargaining order by discharging leading union adherents.

Where there is an outstanding judgment arguably covering the alleged violation, a contempt recommendation is warranted, even though the violation is not identical to or does not grow out of, the offense or dispute in the underlying case. In considering alternative courses of action against the respondent, the scope of the issues in the underlying litigation should be broadly construed and the full natural meaning given to the language of the order.

10632.5(b) Whether the Evidence Meets the Standard of Proof for Establishing Contempt

The evidentiary standard for establishing proof of civil contempt is "clear and convincing" evidence. This has been described as an intermediate standard, lying between "mere preponderance" (civil) and "beyond a reasonable doubt" (criminal) standards. The standard in criminal contempt proceedings, however, is proof "beyond a reasonable doubt." Thus, the evidentiary burden is heavier in contempt than in administrative proceedings, although the legal standard is the same. In civil contempt, a respondent's good faith or lack of willfulness is not a defense.

10632.5(c) Whether More Extensive Remedies, Available (Only in Contempt) Are Deemed Necessary to Ensure Compliance or Whether Board or Other Available Proceedings Will Be More Successful or Expeditious Than Contempt in Achieving Compliance

When the respondent is a recidivist or has engaged in particularly egregious or widespread misconduct, the "stronger medicine" of contempt is prima facie warranted.[145] Prospective noncompliance fines, reimbursement of costs and attorney fees, detailed bargaining requirements, reading and mailing of notices, compensatory damages (if any), and other remedies not available or normally granted in administrative proceedings, are generally imposed by the courts in contempt cases.

Conversely, although the refusal of a respondent to furnish payroll records to compute backpay is clearly contumacious, ultimate satisfaction of the make-whole order normally will be achieved more expeditiously if the Board forgoes contempt in such circumstances and instead either obtains the records through issuance of Section 11

[145] *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 294 (5th Cir. 1971). See also *NLRB v. Electrical Workers Local 3 (Northern Telecom)*, 730 F.2d 870, 881 (2d Cir. 1984) (Board has a statutory duty to seek "broader and more stringent remedies" against a repeat offender); *NLRB v. Florida Steel Corp.*, 648 F.2d 233, 240 (5th Cir. 1981); *NLRB v. Operating Engineers Local 825*, 430 F.2d 1225, 1230 (3d Cir. 1970); *Steelworkers (H. K. Porter Co.) v. NLRB*, 363 F.2d 272, 275 (D.C. Cir. 1966) (a "succession of proceedings resulting in Board orders cast in statutory language is not the answer" when interference with protected rights persists).

subpoenas, or issues a compliance specification based on secondary sources respecting employee earnings or the Region's own best approximation. Section 10618. Finally, contempt will likely be the only recourse when the alleged conduct violates the affirmative, nonmonetary provisions of a decree but not the Act (for example, notice posting, reinstatement, expungement of files, restoration of status quo ante, and execution of contract) or when the 10(b) period has run without a charge having been filed, inasmuch as the 10(b) limitation applies only to administrative proceedings but not to contempt actions.

10632.5(d) Whether Compliance With a Liquidated Backpay Judgment Can Effectively Be Secured Through Collection Proceedings

Collection proceedings are the preferred means of obtaining compliance with a liquidated judgment. See Section 10624.4 regarding circumstances in which contempt proceedings to compel payment may be appropriate, either as an alternative to, or in conjunction with collection proceedings. Collection proceedings normally will be conducted by the Region, with the advice and assistance of the Contempt Litigation & Compliance Branch and other Headquarter's units, as appropriate.

10632.5(e) Whether a Significant Issue Is Peculiarly One For the Exercise of the Board's Expertise

Courts have been reluctant to resolve in contempt proceedings questions implicating representational issues, inasmuch as they are viewed as concerning an area of special Board expertise. Mere complexity of the law, however, is not a reason to forgo contempt proceedings. Nor does the fact that an administrative procedure is available in any way limit the Board's power to seek enforcement of a court decree through contempt proceedings. Rather, the Board's decision to invoke the court's contempt power is in itself an exercise of the Board's discretion in light of its expertise in achieving compliance with its orders.

10632.5(f) Whether the Decree Has Grown Too Stale to Warrant Contempt Proceedings

Judgments enforcing Board orders are permanent in duration and do not lose their efficacy with age. Sustained compliance does not diminish their vitality. "Sustained obedience is just what the law expects."[146] Nevertheless, the age of the decree is to be taken into account and, after a long period of dormancy, a new violation may warrant administrative proceedings rather than contempt, especially if the misconduct is isolated or not egregious. The fact that a judgment is more than a few years old and has not been disobeyed will not, however, by itself, preclude resort to contempt proceedings.

10632.5(g) Whether Immediate Pendent Lite 10(j), 10(l), or 10(e) Injunctive Relief Is Needed; Concurrent Administrative and Contempt Proceedings

In situations where immediate 10(j), 10(l), or 10(e) relief is warranted, concurrent contempt proceedings may not be appropriate because some courts do not favor duplicative litigation. However, there may be reasons for proceeding both administratively and in contempt in a given case, for example, when the facts are

[146] *Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957).

identical but the remedial relief sought may differ. Thus, 8(a)(1) conduct may be alleged as violative in the contempt petition while the same conduct is proven to show animus in support of an allegation of an 8(a)(3) discharge in a concurrent administrative proceeding, either because the outstanding decree does not prohibit 8(a)(3) conduct, or the allegation is not supported by clear and convincing evidence. Moreover, in appropriate circumstances, pendent lite injunctive relief may be obtained in conjunction with a contempt proceeding, pursuant to Section 10(e) of the Act.

10632.6 Region's Submissions Regarding Contempt

Regional recommendations to Washington concerning contempt should contain the following:

- A recommendation by the Regional Director, accompanied by an investigative report of the Compliance Officer or other investigating agent.
- The complete investigative (or compliance) file (or a copy).
- A copy of the judgment or judgments alleged to be violated, together with a summary of the litigation history of the respondent (previous contempt adjudications, judgments, unenforced Board orders, formal and informal settlements and non-Board adjustments).
- When contempt is recommended, particularly for failure to comply with affirmative provisions, documentary and/or testimonial (affidavit or deposition) evidence sufficient to constitute reasonable proof of the violation.
- A statement of any defenses raised by the respondent or otherwise anticipated from the circumstances of the case, with the Region's analysis, including a statement of its reasons for believing the asserted defenses are without merit, and any supporting citations underlying the Region's analysis.
- A recital of all efforts made to achieve compliance or to obtain information respecting the status of compliance.
- A statement concerning the existence and status of any related legal proceedings.

10632.7 Notice to Parties of Board Authorization to Institute Contempt Proceedings

On receipt of the Board's authorization to institute contempt proceedings, the Contempt Litigation & Compliance Branch will normally notify the parties in writing.

If the Board does not authorize contempt proceedings, the Region will be notified. If the Region previously notified the charging party and the respondent that it was recommending contempt, it should notify them of the decision not to proceed in contempt. If the charging party requests a written statement of the reasons for the decision not to seek contempt, it should be advised to submit a written request. The charging party should be notified that a copy of a summary statement or detailed explanation, whichever is requested, setting forth the reasons, also will be provided to the respondent and other parties to the proceeding. Upon receipt, the written request should be forwarded to the Contempt Litigation & Compliance Branch for reply.

10632.8 Documentation of Expenses of Investigating Contempt Allegations and Processing Contempt Proceedings

Courts routinely require respondents who have been adjudged in civil contempt to reimburse the Board for its costs and expenses. These include prevailing or market attorney's fees and other personnel costs, incurred by the Region as well as by Washington Headquarter's staff. When the court awards costs to the Board, the Board, through the Contempt Litigation & Compliance Branch, must (unless the amount is agreed on) prepare and submit to the court a verified statement of such costs so that the court may fix the amount of the award. If the respondent contests the Board's claim, the matter may be referred to a special master for hearing. Accordingly, in all cases in which contempt has been recommended or is anticipated, the Region should maintain detailed, contemporaneous and nonblock time records (for example, January 5, 2004 1.5 hours research on reinstatement obligations, 2.0 hours preparing affidavits, and .5 hours conference call to Contempt) of all field personnel reflecting work performed in the "investigation, preparation, presentation and final disposition" of the contempt proceedings. The records should reflect the case name and number; Board agent name; description of work performed; date work was performed; and the time (in 6-minute intervals)[147] spent performing each specific task. Such time records should be maintained separately for each case by each attorney, field examiner, clerical employee, and any other personnel performing work on the case. Copying and other costs should similarly be recorded; and copies of travel vouchers showing travel expenses related to contempt proceedings should also be retained in the case file for future use in supporting the Board's application for an award of costs.

10632.9 Regional Assistance to Contempt Litigation & Compliance Branch

The Regions are expected to render all requested assistance to the Contempt Litigation & Compliance Branch in investigating, preparing for and prosecuting any contempt case. As a result and as time is often of the essence in these matters, the Region and Contempt should prioritize responding promptly to their respective requests for assistance.

10632.10 Notice to Successors of Potential Contempt Liability

To avoid potential problems of proof of knowledge of unremedied contumacious conduct in a *Golden State* successorship situation, whenever it appears that a third party may acquire the business of a respondent at a time when contempt proceedings have been instituted or are being contemplated, the Region should serve the purchaser with written notice of its potential liability as a successor or otherwise, accompanied by a copy of the relevant judgment.

Any unusual circumstances or problems that would militate against such notice should be directed to the Division of Operations-Management, as set forth in Section 10674.3, prior to a recommendation for contempt proceedings, and to the Contempt Litigation & Compliance Branch, following such recommendation.

[147] If time records are maintained in longer intervals, the time should always be "rounded down," to ensure compliance with the 6-minute interval standard utilized by many courts.

10632.11 Closing Case Involving Contempt Proceeding

The Region should obtain clearance from the Contempt Litigation & Compliance Branch before closing a case in which contempt proceedings have been initiated or are under consideration.

10634 Formal Settlement Stipulations

10634.1 Circumstances in Which Formal Settlement Stipulations May Be Appropriate or Necessary[148]

Even though there may be no prior court judgment(s) involving a respondent, Regions should consider requiring a formal settlement stipulation (that provides for the consent entry of a court judgment enforcing the Board's order) in the following circumstances:

- Respondent has a history of committing unfair labor practices.
- Respondent seems likely to repeat or extend its current unfair labor practices.
- Respondent has engaged in serious violence, particularly if it seems likely to continue or to recur, or has committed other egregious or widespread unfair labor practices.
- Respondent's make-whole liability involves a large amount of money and/or an installment payment plan that will extend over a significant period of time.

Notwithstanding a history recidivism and the probability of continuing violations, a respondent may have managed to avoid court judgments against it by repeatedly entering into informal settlement agreements or voluntarily complying with Board orders. In such circumstances, Regions should carefully consider the potential usefulness of insisting upon a formal settlement stipulation to more effectively deter future violations. If a respondent resists entering into a formal settlement stipulation when a Region has concluded that circumstances necessitate it, the Region should persist in advocating that position before the administrative law judge, despite respondent's argument that an informal settlement agreement would suffice, unless developments during the trial have altered the Region's view about the need for the formal settlement stipulation.[149]

With regard to make whole remedies that involve either a large sum or a lengthy installment payment period,[150] liquidation of the amount due through a formal settlement stipulation providing for entry of a Board order and court judgment places the Agency in the best position to promptly effectuate collection in the event of default and provides potential advantages in the event of bankruptcy. Informal settlements providing for installment payments should include appropriate "default" language providing for ex

[148] See ULP Manual Sections 10164 through 10170.

[149] Upon respondent's request, the Region may include a nonadmissions clause in the formal settlement stipulation as this often facilitates respondent's acceptance. See ULP Manual Sections 10164.5 and 10166.4(a).

[150] For a full discussion of installment agreements and security provisions, see Sections 10592.12 and 10636.

parte entry of a Board order and court judgment upon failure of the respondent to comply fully with the terms of the installment payment agreement.[151] Section 10594.7

10634.2 Submission of Formal Settlement Stipulation by E-mail to the Office of the Executive Secretary

Submission of documents to the Office of the Executive Secretary eliminates the need for duplicative typing. Accordingly, Regions should submit by e-mail to the Office of the Executive Secretary, with a copy to the Division of Operations-Management, all formal settlement stipulations for which they seek the Board's approval.

10634.3 Compliance Actions Following a Formal Settlement Stipulation

The Region should undertake action to obtain compliance with a formal settlement stipulation as soon as the Board has issued the corresponding order, unless the stipulation requires installment payments to begin upon execution of the stipulation. In those circumstances, the Region should undertake action to achieve compliance immediately upon execution of the stipulation.

Although the stipulation is subject to Board approval, the language set forth in the stipulation should make it clear that it is effective nunc pro tunc to the date of execution of the stipulation, immediately upon approval by the Board.

10636 Installment Agreements and Security Provisions

As a condition for accepting installment payments, the Region should normally insist on the same security provisions as are commonly required by creditors in ordinary business transactions as protection against default, insolvency, and bankruptcy. The Region should be particularly alert to situations which raise doubt as to the respondent's ability or willingness to make the agreed-on payments and should err on the side of obtaining security provisions in such areas. Additionally, the Region should normally insist upon default language when it agrees to grant respondent an installment payment plan, even where specific security is provided. Section 10594.7 and Appendix 12. All installment payment plans should be in writing.

In obtaining security provisions for installment agreements, the Region may require a bond, letter of credit, mortgage or deed of trust on real property, a promissory note, assignment of contract proceeds, a confessed judgment for the full amount or a personal guarantee by a principal shareholder.

A guaranty agreement should contain a cognovit's (confession of judgment) provision that enables the Board to immediately obtain a judgment against the guarantor in the event of default.

Before accepting a lien or mortgage on real or personal property, the Region should satisfy itself that there is an unencumbered, lienable interest available. A title search and appraisal almost certainly will be required, for which the respondent should be expected to bear the expense. Any U.C.C. Security Agreement should be perfected as provided by state law. It is imperative, therefore, that the Region become fully

[151] See *NLRB v. Centra, Inc.*, Case 91-5236, (6th Cir. 1995), in which the Sixth Circuit ruled that an informal settlement, consisting only of Respondent's statement on the record and never incorporated in a Board order or enforced, could not serve as a basis to find Respondent in contempt when it failed to pay.

conversant with the practice and procedure for perfecting such liens in each state in which the Region has occasion to ensure the perfection of a lien. Regions should consult with the Contempt Litigation & Compliance Branch for assistance in these matters.

Any lien obtained must be perfected in full compliance with state law as soon as possible. Note, that a trustee or debtor in possession may seek avoidance of a lien perfected within the 90 days immediately preceding the filing of a bankruptcy petition. Section 11 U.S.C. § 547.

When a guaranty agreement is otherwise unobtainable or there are no insufficient assets on which to provide meaningful security, or when such an agreement is otherwise unobtainable, an alternative is to obtain a formal settlement stipulation containing a consent court judgment under which liabilities are fully liquidated and installment terms are fully specified.

When the amount agreed to be paid is less than the full amount computed due by the Region, the respondent should be required to agree to pay, and the formal settlement stipulation should specify, the full amount owed, with a proviso that, on payment of all the installments as scheduled, collection of the balance of full backpay is waived.[152] Formal settlement stipulations providing for installment payments should provide for the payment of interest during the installment payment period.

Sample settlement stipulation and security agreement:

Sample formal settlement stipulations that contain provisions for security and an accompanying security agreement, are set forth in Appendices 14 and 15, respectively. A more comprehensive example of sample language for installment payment plans and other security can be found in Appendix 12. In cases where the respondent has no unencumbered assets to offer as security, the security agreement may be omitted and all references to security may be deleted from the formal settlement stipulation.

Where all parties have entered into the agreement, the executed formal settlement stipulation and security arrangement with a cover memorandum recommending approval should be forwarded directly to the Board, with a copy to the Division of Operations-Management. If the agreement is a unilateral formal settlement stipulation, it should be sent to the Division of Advice, with a copy to the Division of Operations-Management, for approval of the General Counsel, who will then submit it to the Board. In either case, in the memorandum, the Region should describe the pertinent details of the settlement, including whether the backpay amount represents the full amount of net backpay that was claimed or would be claimed in a compliance specification, and, if the amount is less than 100 percent, why the full amount was not obtained. ULP Manual Section 10164.8.

10638 Compliance Stipulations

If the Region had at first concluded that a formal settlement stipulation might be required but later determined that it was not needed, i.e., respondent has agreed to fully comply and it appears likely that additional action to obtain compliance will not be needed, the Region may then determine it is nonetheless necessary to set forth in writing the steps respondent has agreed to take in order to comply with a Board order and/or

[152] The last installment being the balance of full backpay.

court judgment and to include default language. Default language avoids the expense and delay that would result if the agreement were set aside and the case is litigated. The use of default language will not prevent litigation regarding whether there has been non-compliance with the terms of the compliance stipulation or whether such noncompliance has been cured. The possibility of such litigation does not outweigh the above-noted benefits, which are likely to result from the use of such language. A stipulation that includes default language may be a practical alternative, which would result in the filing of a motion for summary judgment on the allegations of the compliance specification, in the event respondent failed to comply with the terms of the stipulation. See Appendix 16 for a sample compliance stipulation.

10640 Other Stipulations

In some situations, such as when the amount owed is relatively small, the payment plan is of short duration, the down payment constitutes a significant proportion of the total remedy, the respondent appears likely to comply, and when the respondent refuses to enter into a formal settlement stipulation, but will agree to an informal installment plan, the Region may conclude that a formal settlement stipulation providing for a supplemental court judgment concerning the payment of backpay is not warranted. In such cases, an informal settlement agreement may be appropriate.

10642 Consent Order

Prior to the opening of the hearing, the Regional Director may approve a settlement to resolve a case, whether by means of an informal settlement agreement or a formal settlement stipulation. After a hearing has opened, however, even if both the Regional Director and the charging party oppose a settlement proffered by a respondent, the ALJ has the authority to approve such a "settlement" by "consent order," so long as the respondent's proposal provides a full remedy for the alleged violations.[153] This appears to apply whether respondent's proposed settlement is informal or formal. See *National Telephone Services*, 301 NLRB 1, 1 fn. 2 (1991); *Electrical Workers Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971); *Brandt Construction Co.*, Cases 33–CA–12420, 12686 (1999) (not reported in Board volume). However, where the respondent has a history of recidivism and the Region believes that acceptance of an informal settlement does not effectuate the purposes of the Act, an objection should be noted on the record and the Region should consult with the Division of Operations-Management to determine whether an appeal should be promptly filed with the Board pursuant to Section 102.26 of the Rules and Regulations.

10644 Closure of Formal Settlement Cases

In cases where a formal settlement stipulation provides for a Board order and consent court judgment, the case should not be closed until after the decree has been entered, despite earlier full compliance.

[153] The General Counsel or any other aggrieved party may ask for leave to appeal to the Board, as set forth in Sec. 101.9(d)(2), Statements of Procedure, and Section 102.26, Rules and Regulations.

10646 Formal Compliance Proceedings

10646.1 Overview

Formal compliance proceedings may be used to litigate or compel compliance of almost any compliance issue under a Board order, including backpay, specific bargaining requirements, reinstatement, and successorship, alter ego or other derivative liability issues.

Compliance proceedings may be appropriate when a respondent disputes the Region's determination of net backpay or other compliance requirements. Compliance proceedings may also be appropriate to fully liquidate backpay liabilities or other compliance requirements even where no specific issue has been disputed by the respondent, but where the respondent has not cooperated or has asserted an inability to pay its liabilities. In those situations in which, pursuant to a judgment enforcing a Board order that does not liquidate backpay, the amount of backpay is computed and paid, there is ordinarily no need for compliance proceedings to formally liquidate backpay due.

Compliance proceedings may be appropriate whenever a legitimate dispute exists concerning compliance requirements under a Board order. However, when a respondent is refusing to comply with clear provisions of an enforced Board order, institution of contempt proceedings rather than or in addition to compliance proceedings may be warranted. See Section 10623.5 regarding criteria for recommending contempt proceedings.

Compliance proceedings are restricted to controversies arising from the requirements of remedial provisions of a Board order. They may not be used to relitigate underlying findings of violations of the Act or other issues already decided in the Board order. Formal compliance proceedings begin when the Region issues a compliance specification in which it alleges compliance requirements under the Board order. Issuance of the compliance specification leads to a supplemental hearing before an administrative law judge at which disputed issues are litigated, followed by the issuance of a supplemental decision and a Board supplemental decision and order that will direct the respondent to undertake clearly defined actions in compliance with provisions of its underlying order.

For example, a typical Board supplemental decision and order arising from disputed backpay issues will make findings concerning all the disputed compliance issues and then direct the respondent to pay a specified sum in net backpay, plus interest, to a discriminatee.

Compliance requirements under a Board supplemental order should be clear and not subject to continuing dispute. The Region may refer a Board supplemental order for enforcement, using procedures set forth in Section 10606. The following sections set forth procedures for undertaking formal compliance proceedings.

10646.2 Court Enforcement of Board Order Normally Required Before Compliance Specification May Issue

In general, a Board order should normally be enforced by a U.S. court of appeals before a compliance specification may be issued.

If compliance with a Board order cannot be resolved, it is generally appropriate to refer the case for initiation of enforcement proceedings, as set forth in Sections 10606 and 10608. There are situations when court enforcement is not required to issue a compliance specification. These situations are set forth in the sections immediately following. Although the Region should normally seek voluntary compliance with an enforced Board order or settlement of disputed compliance issues, it may initiate formal compliance proceedings at any time after a judgment has been entered enforcing the Board order. Formal compliance proceedings concerning 8(a)(3) and 8(b)(2) violations should be given the same priority as other 8(a)(3) or 8(b)(2) cases at various other stages. ULP Manual Section 11740.1. In cases with a court enforced Board order, the Region may issue a compliance specification without prior authorization from the Division of Operations-Management. Compliance proceedings also should be accelerated in cases where there appears to be a likelihood of collection problems, in no-answer default judgment cases or in cases when no exceptions are taken to the administrative law judge's decision. Compliance proceedings should also be accelerated in cases where issues of derivative liability are implicated.

10646.3 Compliance Proceeding Combined With Unfair Labor Practice Proceeding

In the following situations, where consolidation will facilitate full resolution of a dispute, Regions should consider consolidating compliance proceedings with underlying or related unfair labor practice proceedings (See Section 102.54(b) of the Board's Rules and Regulations):

- The backpay periods are of relatively short duration and have ended before the unfair labor practice hearing begins.
- Alter ego or other derivative liability issues arise prior to the opening of the hearing.
- Backpay or other compliance issues are relatively simple and their consolidation will not confuse, impede, or unduly prolong the unfair labor practice hearing.
- Where the respondent is likely to default, or has defaulted, with respect to the unfair labor practice complaint, and the case will be adjudicated in a summary manner.

In the above situations, a compliance specification should be prepared and served on the respondent in addition to the complaint. Novel or complex issues should be submitted to the Division of Operations-Management for clearance.

10646.4 Compliance Proceedings Without Court Enforced Board Order

See Section 10606.1

10646.5 Compliance Proceedings Based on a Compliance Stipulation

To forgo enforcement proceedings but litigate disputed compliance issues under a Board order, a respondent may enter into a stipulation that provides for compliance proceedings without enforcement of the Board order. If a respondent does not dispute the

findings in a Board order that it violated the Act, but disputes specific remedial requirements, such a stipulation should be proposed as an alternative to enforcement proceedings to provide for compliance proceedings to address the compliance dispute.

10646.6 Unresolved Reinstatement Issues; Potential Contempt Issues

In some situations, reinstatement issues may provide a basis for contempt proceedings. As set forth in Section 10530.7, authorization from the Contempt Litigation & Compliance Branch is required before issuing a compliance specification when reinstatement issues are involved. Section 10606.2; Appendix 13.

10646.7 Sample Stipulation

See Appendix 13 for a sample stipulation providing for compliance proceedings under a Board order without court enforcement.

Among the provisions of the stipulation is a waiver of the respondent's right to contest the underlying findings of the Board order. Only compliance issues are subject to further litigation. The Regional Director has authority to approve the stipulation.

10648 Preparation of Compliance Specification and Notice of Hearing

10648.1 Overview

The basic purpose of the compliance specification is to narrow proceedings to those compliance issues in dispute and to set forth clearly the compliance requirements of those disputed issues.

Provisions of the Board order that have been complied with should not be addressed in the compliance specification.

For example, if a respondent has posted remedial notices, reinstated a discriminatee and complied with all other provisions of a Board order but disputes the Region's determination of backpay, the compliance specification should make allegations only concerning backpay.

In addressing the disputed compliance issues, the compliance specification should reflect the Region's determination of full compliance requirements, regardless of any positions taken or offers made during settlement efforts. Section 10592.15. The specification should be as specific, detailed, and accurate as the circumstances of the case permit. Each affirmative allegation should be set forth to call for an admission or a denial in the respondent's answer. With respect to allegations concerning backpay, the specification should set forth all relevant facts upon which backpay was determined, such as the dates the backpay period began and ended, wage rates in effect for relevant employees, the appropriate method for determining backpay, arithmetic calculations, and the resulting amount of net backpay due. With respect to allegations concerning issues other than backpay, the specification should allege clearly all aspects of the respondent's failure to fully comply with the Board order, including a description of any specific conduct at issue, the names of respondent's representatives who engaged in this conduct and the dates and places where the conduct occurred, leading to allegations as to affirmative actions required to comply.

In the interest of protecting individuals' right of privacy, social security numbers should never be included in compliance specifications. To the extent it is necessary to identify individuals by social security numbers in any such document, only the last 4 digits of the social security numbers should be used. The format of the number would be ###-##-_____. To the extent any document containing a social security number must be released to the public, care should be taken to redact these numbers.

10648.2 Regional Authority to Issue Compliance Specifications

A compliance specification is prepared and served over the signature of the Regional Director. Sections 102.54 and 102.55 of the Board's Rules and Regulations.

10648.3 All Joint Respondents to be Named

All respondents to the compliance proceeding should be named in the caption of the compliance specification and served. See Section 10650.3. Respondents that should be named include all jointly liable respondents, sole proprietors, partners, successors, alter egos, joint employers, fraudulent transferees, and individuals against whom individual liability is sought. (For example, in the case of a sole proprietorship, John Leakey, d/b/a Leakey Plumbing, or, in the case of a partnership, John Leakey and Mary Leakey, d/b/a Leakey Plumbing.)

Additionally, the Region should ensure that Board orders include the correct caption, in full, and that the "order" section specifies by name the individual owners who are personally liable for compliance. Where recommended orders do not fully and accurately set forth all responsible individuals, a motion should be filed with the administrative law judge for the necessary corrections. Likewise, an appropriate motion should be made to the Board if its order presents the same omission.

In cases of joint and several liability, even when one of the parties has paid its share of backpay, it should nevertheless be named as a respondent in the compliance specification. Section 10592.13.

10648.4 Burdens of Proof

The Region's burden of proof in compliance proceedings regarding allegations other than those that pertain to backpay is generally the same as its burden in an underlying unfair labor practice proceeding, that is, allegations must be proved by a preponderance of evidence.

In backpay cases, the Region's specific burden is to establish that the gross backpay formula and amount is reasonable. Section 10540.1. Normally, it will not aid the General Counsel's case to litigate defenses not properly raised by the respondent. Section 10662.3.

In cases where the respondent has not cooperated by providing records needed to determine or calculate backpay, allegations should be based on other sources of information or fair approximations. Any doubts should be resolved against the respondent. The respondent's noncooperation should be pled and the Region should ask the Board for an order precluding the respondent from introducing previously demanded records in order to contest gross backpay. Cf. Fed.R.Civ.P. 37(b)(2)(B).

It is also the Region's burden to establish expenses incurred by the discriminatees in seeking or maintaining interim employment that should be offset against interim earnings. Section 10556. Further it is the Region's burden to establish expenses incurred by the discriminatees to obtain replacement benefits such as health insurance, retirement policies, and 401(k) plans.

Even where discriminatee expenses are minimal, allegations concerning expenses incurred in seeking employment should be included in the specification, because they support discriminatee mitigation efforts. Section 10558.

All elements of a backpay case that reduce the respondent's gross backpay liability, such as interim earnings and mitigation, are the respondent's burden.[154] The Region, however, should include in a compliance specification interim earnings, a failure to mitigate and other facts that reduce gross backpay that have been established to the Region's satisfaction during the course of the backpay investigation.

If the respondent establishes that the discriminatee quit an interim job, it becomes the burden of the General Counsel to demonstrate that the decision to quit was reasonable. Sections 10558.4 and 10666.8.

10648.5 Affirmative Allegations

The compliance specification should plead all compliance issues for which the Region has the burden of proof in the form of affirmative allegations.

Complaint pleading manual paragraphs should be followed as closely as possible for alleging nonbackpay issues.

The specification should affirmatively plead the ultimate facts on which successorship, individual liability or other derivative liability is sought. Regarding backpay, the compliance specification should contain affirmative allegations regarding all the basic facts, such as the dates of the backpay period, rates of pay and hours worked by replacement employees, the method used to determine gross backpay, and the calculations leading to a resulting backpay amount due.

Allegations set forth in the specification should generally be supplemented with appendices that set forth and summarize underlying facts and figures and the calculations applied to them to show gross backpay, interim earnings or other adjustments and final net backpay for each discriminatee.

Appendices may be produced using computer spreadsheet programs now available in the Regions.

Calculations should be based on calendar quarters. Final net backpay is the sum of net backpay due for each quarter of the backpay period. Section 10564.2.

10648.6 Pleading Issues for Which the Respondent Bears the Burden of Proof

The compliance specification should not plead allegations concerning issues for which the respondent has the burden of proof. Where established to the Region's satisfaction, these issues should be included in the specification. For example, the

[154] *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 655 (1989); *Colorado Forge Corp.*, 285 NLRB 30, 538 (1987); *Rainbow Coaches*, 280 NRB 166, 179–180 (1986).

compliance specification should set forth the interim earnings of each discriminatee. See Section 10550 regarding interim earnings.

The Region should only include interim earnings that it has concluded should be offset against gross backpay, even if the respondent disputes the Region's conclusions and is expected to raise the issue in the compliance hearing. The Region should not plead allegations concerning interim earnings in anticipation of respondent arguments. Rather, the respondent will bear the burden in the compliance hearing of proving that additional interim earnings should be offset against gross backpay.

If the Region has concluded that there is no net backpay entitlement for a discriminatee, either because interim earnings exceeded gross backpay for every quarter of the backpay period or the discriminatee was unavailable for interim employment throughout the backpay period, the compliance specification should not include that discriminatee.

If the Region has concluded that a discriminatee was available for interim employment or has met his or her obligation to mitigate, it should not set forth these conclusions in the compliance specification as affirmative allegations, even if the issues are close, or if it expects the respondent to raise these issues in the compliance hearing. Rather, net backpay due the discriminatee should be set forth on the basis of allegations concerning gross backpay, with no deduction. It will be the respondent's burden at the compliance hearing to prove that deductions from gross backpay are warranted as a result of these issues.

If the Region has concluded that a discriminatee was unavailable for interim employment or failed to meet his or her obligation to mitigate for part of the backpay period, this should be included in the compliance specification, with the appropriate periods set forth.

See Sections 10558 and 10560 regarding mitigation and issues concerning unavailability for interim employment.

10648.7 Missing or Uncooperative Discriminatees

The Board's backpay remedy is a public and not a private right and is directed primarily towards effectuating the purposes of the Act; that is, to discourage the commission of unfair labor practices. Failure to pursue backpay for missing or uncooperative discriminatees would, in effect, ignore the Board's obligation of effectuating remedies awarded in Board orders and court judgments. Thus, backpay should be alleged in the compliance specification for missing and uncooperative discriminatees.[155] See also Sections 10548.3 and 10562.4.

If a discriminatee is missing at the time of hearing or has been uncooperative during the investigation of the backpay claim and interim earnings data has not been obtained, the compliance specification should include the claim at the level of full gross backpay. No admission should be made concerning interim earnings and employment.

[155] See, for example, *Steve Aloi Ford, Inc.*, 190 NLRB 661 (1971); and *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648 fn. 5 (1989).

Net backpay will thus be the same as gross backpay in these cases.[156] The respondent will have the burden of proving any offsets to gross backpay.

See Section 10662.4 regarding the scope of the Region's responsibility for making discriminatees available as witnesses for the respondent. See Section 10662.7 for the statements to be made at hearing regarding discriminatees who are not present to testify. See Sections 10582.3 and 10584 regarding holding of funds and extinguishment of backpay entitlements for missing discriminatees.

10648.8 Deceased Discriminatees

Backpay should be claimed for deceased discriminatees in the compliance specification[157] and, when collected, paid as provided in Section 10576.6.

Because the date of death is a fact that reduces the respondent's gross backpay liability, it should not be affirmatively pled in the compliance specification, but stated if known. If the Region cannot establish the date of death, it is the respondent's burden to prove it.

10648.9 Special Remedies

When the relief being sought is novel or unique, the specification should contain a specific request for that remedial relief, in order to provide respondent adequate notice. Such a request should specifically reserve the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy.

10648.10 Preparing Tabulations and Charts Explaining Computations

Consideration should be given to attaching charts, tables, or summaries to the compliance specification as exhibits. Exhibit charts, tables, and summaries are particularly helpful to illustrate complex gross backpay computations and to summarize voluminous records relied upon by the Compliance Officer during preparation of the compliance specification. Computer software programs, such as Excel and Access, are extremely helpful when preparing exhibit summaries. See generally Rule 1006 of the Federal Rules of Evidence.

For example, if the General Counsel contends, over respondent opposition, that a pay raise would have been received by the discriminatees during the backpay period, an exhibit table, summarizing data obtained from the gross employer's records, may be prepared to support the General Counsel's position. This exhibit may include information regarding the name and job classification of each employee who received a raise during the backpay period, the amount of each raise and the date each raise was received. By way of further example, exhibit summaries may be helpful concerning bonuses paid, the transfer of employees between departments and jobsites, the order of employee layoff and recall, and/or overtime opportunities, among others.

10648.11 Sample Specification

See Appendix 17 for a sample compliance specification and notice of hearing that may be used as a guide. Note the following considerations:

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[156] *Iron Workers Local 373 (Building Contractors)*, supra at 655 fn. 41.
[157] *St. Regis Paper Co.*, 285 NLRB 293, 295 (1987).

A. Paragraph designation: The paragraph designation system of the sample specification may be altered to accord with Region practice or the requirements of a particular case. However, there should be a paragraph and subparagraph outline consistently lettered or numbered to enable the respondent in its answer to refer to the specification by paragraph and subparagraph for the purpose of making denials, admissions, and explanations with the specificity required by Section 102.56 of the Board's Rules and Regulations. See Section 10652 regarding the requirements of an answer to a compliance specification. Because the sample specification is illustrative, only the first of each of the various appendices referred to in various paragraphs of the text is reproduced.

B. Demand for interest: Because the Board includes interest accrued on back wages as part of the make-whole remedy, the summary in paragraph 10 of the sample specification indicates that interest is to be added to the amounts of net backpay found due. Because the date of payment and hence the interest amount on backpay are not known at the time the compliance specification is issued, partial amounts of interest should not be set forth in the specification.

10648.12 Sample of Specification With Computation in Text

In complex cases, when varying circumstances, pay rates, job classifications, and backpay periods must be considered, it may be helpful to set forth a separate specific computation with separate allegations in the text, as in the following sample, rather than to attach separate appendices for each discriminatee. In using this format, the description of the basic method of computing gross backpay with supporting tabulations must be noted in a prior section of the specification, while the name of each discriminatee should be preceded by a numeral or letter (as appropriate in accordance with the outline being used for the specification as a whole) so that the denials, admissions, or explanations of the respondent's answer may be easily keyed to the specification.

For example: I. Boyd, Alvy:

a. Boyd's backpay period begins February 13, 20__, and ends July 25, 20__.

b. Boyd was employed in the job classification "mechanic repairman" at the pay rate of $7 per hour prior to discrimination.

c. Boyd's interim employment and earnings are as follows and it is alleged his expenses are as follows:

Calendar Qtr.	Remarks	Interim Earnings	Expenses
20___-1	Unemployed	None	
20___-2	Transportation seeking work	----	$ 6.00
	Self-employed	$262.50	
	Transportation seeking work—$4	----	
	Transportation to and from work—$22.50	----	$26.50
20___-3	Self-employed	$ 87.50	
	Transportation to and from work	----	$ 7.50

d. Boyd's gross and net backpay by calendar quarters are set forth below:

Calendar Qtr.	Hours & Pay Rates	Gross Backpay	Net Interim Earnings	Net Backpay
20___-1	321 at $7.00	$2,247.00	$ 0.00	$2,247.00
20___-2	616 at $7.00	$4,312.00	$1,200.00	$3,112.00
20___-3	145 at $7.00	$1,015.00	$ 800.00	$ 215.00

10650 Procedures Following Issuance of Compliance Specification

10650.1 Complaint Case Procedures Generally Applicable

The procedures and trial techniques noted in ULP Manual Sections 10250 through 10452 covering formal proceedings in complaint cases should be followed, except where they are inconsistent with this manual, the Rules and Regulations, or are otherwise inappropriate or inapplicable. Sections 102.52 through 102.59 of the Board's Rules and Regulations should be observed.

10650.2 Procurement of Hearing Date

The procedures of ULP Manual Section 10268.2 should be followed, substituting "Compliance Specification" for "Complaint." The last paragraph of ULP Manual Section 10268.2 does not apply to compliance proceedings. The answer requirement should set forth a date 21 days from issuance, unless that date is a holiday. Section 102.56(a) Board's Rules and Regulations.

10650.3 Service of Compliance Specifications

A copy of the compliance specification and notice of hearing should be served on each named original and additional respondent and on the charging party by certified mail or as otherwise provided by Section 102.113 of the Board's Rules and Regulations as far in advance of the hearing as practical, and, in any case, at least 21 days before the date set for the hearing.

10650.4 Notice to Discriminatees

The discriminatees and all potential witnesses should be notified of the hearing date by letter and advised that the trial attorney and/or Compliance Officer will call them prior to the hearing for an interview. They should also be advised of the possibility that they will be subpoenaed to testify at the hearing.

10650.5 Disclosure of Factual Information Relevant to the Compilation

It is Board policy to make available to the respondent, on request, and after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement. This policy does not apply where the respondent has refused to cooperate in the Region's backpay investigation.

Disclosure prior to issuance of a compliance specification is not required. Requests for disclosure prior thereto should be refused, unless the Regional Director determines that such disclosure will enhance possibilities of settlement.

This disclosure policy extends to information contained in documents in the possession of the Region, including, compliance affidavits, discrete portions of initial affidavits that directly concern the discriminatee's backpay calculation or other documents concerning discriminatee interim employment and earnings, search for employment, or availability for employment.

The disclosure policy pertains only to backpay or related computations, and does not require disclosure of information relating to other issues, such as successor employer, single employer, joint employer, alter ego, disguised continuance, or personal liability.

Making the relevant documents available to respondent for review and copying, after appropriate redactions have been made, will normally satisfy this disclosure policy. It should be made clear to a respondent requesting this information that it is not routine public information, and it is to be supplied only for use in this compliance proceeding. As regional compliance files often contain confidential information not subject to disclosure, as discussed below, respondent should not be granted free access to "look through" the compliance file.

When implementing this policy, care should be exercised to ensure that confidentiality and privacy protections, afforded to individuals identified in compliance documents and to neutral third parties who provide documents during the compliance investigation, are maintained. See Sec. 102.117 of the Rules (Freedom of Information Act).[158]

The following sample list of documents gathered during compliance backpay investigations is provided as a general guide to Regions regarding document disclosure pursuant to this policy. Any questions regarding document disclosure pursuant to this policy should be referred to the General Counsel's FOIA Officer, Division of Advice, Legal Research Section, in Headquarters.

1. Documents provided to the Region by a discriminatee, concerning himself/herself, that may be disclosed without redaction (except for the discriminatee's social security number):

- paycheck stubs, timecards, work schedules—at respondent and interim employers,
- W-2 Income Tax Forms,
- documents showing the payment by the discriminatee of union dues and initiation fees,
- documents showing search for work expenses, such as mileage logs, telephone, postage and photocopy receipts,
- discriminatee search for work log submitted to a state unemployment office,
- documents showing interim employment expenses, such as motel bills, groceries, uniforms, work shoes, mileage, and toll receipts,

[158] Particular care must be taken before disclosing commercial or financial information gathered during the compliance investigation from third party interim employers as this information may be protected from disclosure by the Freedom of Information Act Exemption 4. See Sec. 102.117(c)(2)(iv). See also *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992), cert denied 113 S.Ct. 1579 (1993).

- documents showing payment by the discriminatee for medical insurance, if claimed,
- documents showing discriminatee contributions to benefit funds, 401(k), and/or mutual funds, if claimed.

2. Documents provided to the Region by a third party, regarding a discriminatee, that may be disclosed without redaction (except for the discriminatee's social security number):

- report from a Government agency showing the earnings of the discriminatee only, at respondent and interim employees,
- report from a Government agency showing search for work expenses of the discriminatee only,
- correspondence from interim employers setting forth earnings of the discriminatee only.

3. Documents provided to the Region by a discriminatee that may be disclosed following redaction of confidential information:

- Compliance affidavit/questionnaire from the discriminatee. Redact the name and personal identifying information of anyone other than the discriminatee named in the affidavit/questionnaire. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.
- Initial affidavit from the discriminatee. The disclosure should be limited to discrete portions of the affidavit that concern the backpay calculation, such as hourly rate and average overtime hours worked when employed at Respondent, initial search work for efforts during the investigation, etc. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.
- Income Tax Returns. All information unrelated to discriminatee earnings should be redacted, such as the social security number and wages of the discriminatee's spouse, dependent information, alimony, medical information/deductions, investments, charitable donations, etc.
- Calendars, logs, and diaries kept by the discriminatee documenting search for work or interim employment, such as days and hours worked in the construction trade. Names, personal identifiers, and information regarding individuals who are not named discriminatees should be redacted.
- Documents showing discriminatee medical expenses, if claimed. Confidential medical diagnosis and treatment information should be redacted.
- Canceled checks and discriminatee bank statements. (These documents may be submitted to support expenses claimed by the discriminatee.) Redact the discriminatee's checking account number from checks and bank statements.

Redact all information on the bank statements not directly related to expenses claimed or interim earnings. For jointly held checking accounts, redact all information unrelated to the discriminatee.

- Credit card statements. (These statements may be submitted to support expenses claimed by the discriminatee.) Redact the discriminatee's credit card number. Redact all information on the credit card statements not directly related to expenses claimed. For jointly held credit card accounts, redact all information unrelated to the discriminatee.

4. Documents provided to the Region by a third party, regarding a discriminatee, that may be disclosed following redaction of confidential information:

- Compliance affidavits from individuals other than the named discriminatee. Redact the name and personal identifying information of the affiant and anyone other than the discriminatee named in the affidavit. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.

- Initial affidavits from individuals other than the discriminatee. Redact the name and personal identifying information of the affiant and anyone other than the discriminatee named in the affidavit. The disclosure should be limited to discrete portions of the affidavit that concern the backpay calculation, such as hourly rates paid and average overtime hours worked at Respondent, etc. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.

- Payroll information received from interim employers. Redact all information not pertaining to the discriminatee, such as names, social security numbers, wage, hour and benefit information regarding other individuals.

- Medical information received from interim employers. Redact all confidential medical diagnosis and treatment information. Redact any information not pertaining to the discriminatee, such as names, social security numbers, medical expense and treatment information regarding other individuals.

- Fund contribution records received from a benefit fund or union. Redact all information not pertaining to the discriminatee, such as names, social security numbers, wage, hour and benefit information regarding other individuals.

- Reports from a Government agency showing wages paid and benefits to employees of respondent or an interim employer. Redact all information not pertaining to the discriminatee, such as names, social security numbers, and wage, hour and benefit information regarding other individuals.

5. Documents that should not be disclosed to respondent pursuant to this policy:

- Documents that reflect the deliberative or policy-making processes of the agency, such as final investigative reports, agenda minutes, comments on

appeal, internal advice or appeals memoranda to the General Counsel, board agent file notes, among other documents.

- Documents that reflect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, such as trial attorney pretrial preparation notes, and position statements received from charging party counsel.
- Information that would not normally be available to a party in private litigation.
- Identification of confidential sources of information to the agency, such as the names and personal identifiers of individuals other than the discriminatee.

10652 Analysis and Response to Respondent's Answer to Compliance Specification

10652.1 No Answer Filed

Section 102.56(c) of the Rules and Regulations provides that, absent a denial or an adequate explanation, the Board may deem respondent to have admitted and may preclude it from controverting, the corresponding allegation(s). If respondent fails to file an answer within the time initially allowed, the trial attorney should communicate in writing with respondent's counsel or, if not represented, directly with respondent, to advise that notwithstanding the Board's Rules and Regulations, respondent failed to file an answer.[159] The trial attorney should extend respondent's deadline to do so, normally no more than 1 week, and advise that the General Counsel will otherwise file a motion for default judgment.[160]

If respondent still files no answer by the extended deadline, the Region should file a motion for default judgment with the Board, which will typically either deny the motion or issue an order to show cause as to why it should not be granted and postpone the hearing. In filing motions, the Region should observe ULP Manual Sections 10290 and 10292.[161]

10652.2 Answer Filed, Allegations Not Explicitly Denied

Section 102.56(b) of the Board's Rules and Regulations provides that if the respondent disputes the accuracy of the backpay amount or the premises on which it is based as alleged in the compliance specification, its answer to the compliance specification shall specifically state the basis for the disagreement, setting forth in detail the respondent's position as to applicable premises and furnishing appropriate alternative figures and amounts. General denials by the respondent to allegations regarding the calculation of backpay are not sufficient and do not comply with the requirements of Section 102.56(b) and (c) of the Rules and Regulations. Pursuant to a motion for

[159] Although the Region normally will bring the failure to file to respondent's attention and provide a brief period to correct the deficiency, it need not do so. *T-3 Group Ltd.*, 339 NLRB 796 (2003); *Superior Industries International*, 289 NLRB 834 fn. 13 (1988).

[160] This procedure parallels Section 10280.3 of the ULP Manual. Until 2003, the Board historically had treated motions for judgment based on a respondent's failure to answer a complaint or compliance specification as motions for summary judgment. As (revised) OM 04-20 notes, the Board has decided that the term "default judgment" more accurately describes a judgment based on a failure to answer.

[161] Section 102.24(b) of the Board's Rules and Regulations sets forth requirements for the timely filing of motions for default judgment.

summary judgment, the administrative law judge or the Board may deem these allegations to be admitted as true.

The trial attorney should carefully analyze the answer, comparing it point-by-point with the specification, to note allegations in the specification that respondent admitted or did not explicitly answer. If the answer is defective, the Region should consider filing a motion for summary judgment or partial summary judgment, as appropriate.

The Region should move at the compliance hearing that the administrative law judge deem allegations not properly answered be admitted without taking evidence in support of the allegations and precluding the respondent from offering evidence to controvert them. Section 10662.2.

Before filing either a motion with the Board or with the administrative law judge, the trial attorney should advise the respondent in writing that the answer is deficient and, following the procedures in Section 10652.1, allow the respondent a period of time, typically not to exceed 1 week, to file an amended answer.

General denials by the respondent with respect to the allegations concerning the interim earnings and mitigation of the discriminatees and to the allegations relating to issues other than the computation of backpay, such as alter ego or successor status, will suffice to require a hearing.[162]

10654 Amendment of Compliance Specifications

Section 102.55(c) of the Rules and Regulations gives the Regional Director discretion to amend the specification after the issuance of the notice of hearing and prior to the opening of the hearing and, after the opening of the hearing, on leave of the administrative law judge or the Board for good cause.

In the event that newly-acquired information prompts the Region to decide to adjust allegation(s) in the specification, either prior to or during the hearing, it is helpful to advise the judge and parties of the Region's intent to amend the specification and, as soon as practicable, to provide them with any exhibit or appendix showing new calculations that the Region will move to substitute.

10656 Withdrawal of Specification on Compliance

10656.1 Before the Compliance Hearing

Upon compliance or settlement, the Regional Director may withdraw the compliance specification on receipt of backpay. Standards set forth in Section 10592 apply after a compliance specification has issued. When authorization from the Division of Operations-Management is required to accept a settlement, the Region should not withdraw the compliance specification until it has obtained authorization. In general, the Region should not withdraw the compliance specification until respondent has actually remitted all backpay and has otherwise complied fully.

[162] See, for example, *Best Roofing Co.*, 304 NLRB 727, 728 (1991); *Castaways Management, Inc.*, 303 NLRB 374, 375 (1991).

10656.2 Case Pending Before Administrative Law Judge

The same criteria as above govern withdrawal of the compliance specification at this stage except that withdrawal requires leave by the administrative law judge.

10656.3 After Transfer of Case to the Board

If a proposed settlement agreement is obtained at this stage, the Region should file a motion with the Board to remand the matter to the Regional Director for compliance.

10658 Preparation for the Compliance Hearing

10658.1 Overview

Appropriate preparation is critical to the successful litigation of a compliance specification. The trial attorney must carefully analyze and review the Board order, court judgment, compliance specification, and answer. The trial attorney must become familiar with the distinctions between litigation of a compliance specification hearing and an unfair labor practice trial, most importantly the specific burdens of proof accorded the General Counsel and respondent, as set forth in the Board's Rules and Regulations regarding compliance specifications and answers.[163] See Sections 10648.4–10648.6; Rules and Regulations Sections 102.55 and 102.56. The trial attorney should be familiar with the compliance case file and any relevant information contained in the underlying investigative and trial files.

At the outset, the trial attorney should discuss preparation with the Compliance Officer, who may be required to testify at the hearing. Since the Compliance Officer is an invaluable resource to the trial attorney, possessing considerable knowledge of the records gathered and analyzed during the compliance investigation, together with a thorough understanding of the General Counsel's theories, as set forth in the compliance specification, a collaborative working relationship between the trial attorney and the Compliance Officer will enhance prehearing preparation and litigation of the compliance specification.

The compliance hearing is conducted in a manner similar to an unfair labor practice hearing. Generally, procedures set forth in ULP Manual Sections 10330 and 10352 are applicable. Considerations particular to compliance proceedings are addressed below.

10658.2 Arrangement for Production of Records, Service of Subpoenas, and Pretrial Stipulations

The trial attorney should subpoena and, if possible, make advanced arrangements for the production of the original records necessary to prove backpay or other affirmative allegations contained in the compliance specification. If the gross backpay computations are in dispute, the records of the gross employer, whether or not it is a respondent,[164] on which the gross backpay computation was based, should be available at the hearing. Thus, if the gross backpay figure is challenged at any point, supporting evidence will be available and appropriate portions may be copied for use at the hearing.

[163] See *Minette Mills, Inc.*, 316 NLRB 1009, 1010–1011 (1995).
[164] The gross employer is the employer where the discriminatee was employed at the time of the unfair labor practice.

Subpoenas ad testificandum and duces tecum should be issued to ensure the availability at hearing of all relevant testimony and documents needed to prove the compliance specification allegations that are the General Counsel's burden and to rebut anticipated respondent defenses. Sections 10648.4–10648.6. ULP Manual Sections 11772–11784. See ULP Manual Sections 10340, 11778, and 11782.4 with regard to the service of subpoenas.

Where appropriate, prehearing efforts should also be made to obtain factual stipulations concerning matters contained in the records or matters that are not subject to controversy. Stipulations should contain detailed, factual assertions and should not be conclusionary. ULP Manual Section 10392. Records gathered during the compliance investigation, either voluntarily or in response to an investigative subpoena, should be carefully reviewed and analyzed prior to the hearing. Relevant records should be prepared, copied, and marked, for introduction into evidence at the hearing. ULP Manual Sections 10334.1, 10338, and 10398. Where helpful to explain the General Counsel's theory of the case, appropriate charts, tables or summaries of voluminous or complex records should be prepared for introduction into evidence. Section 10660.2. Rule 1006, Federal Rules of Evidence.

10660 Preparation of Testimony and Evidence Concerning Gross Backpay Computation and Discriminatee Expenses

10660.1 Testimony of Compliance Officer

Where respondent's answer disputes the accuracy of the gross backpay figures or the premises on which they are based and respondent's answer satisfies the requirements set forth in the Board's Rules regarding specificity, testimony of the Compliance Officer is generally appropriate to describe the factual information used to calculate the gross backpay figures and explain the rationale for the method selected to compute backpay. Section 10652.2; Sections 102.56(b) and (c), Rules and Regulations. The trial attorney should prepare the Compliance Officer to testify concerning the basis of the computation and the reasons for selecting the gross backpay formula set forth in the compliance specification.

The trial attorney should also prepare the Compliance Officer for cross-examination, and advise the Compliance Officer of potential areas of cross-examination based on prior discussions with the respondent's counsel, respondent's answer, and the Region's participation in any prehearing conferences with the administrative law judge. Sections 10660.7 and 10660.8. As appropriate, the Compliance Officer should also be prepared to testify concerning the propriety of any alternative computation offered by the respondent.

As specifically relevant to compliance proceedings, Regional Directors may consider and decide whether or not to approve requests for authorization to permit Board agent testimony and document disclosure under Section 102.118, in the name of the General Counsel, (a) when Compliance Officers, and other Board agents serving in a Compliance Officer role testify at compliance proceedings with regard to the compliance specification preparation and (b) when Board agent testimony is necessary to establish that a respondent has failed to perform an affirmative act pursuant to a court enforced

Board order. As set forth in detail in GC Memos 94-14, 98-7, and 98-9, the General Counsel has delegated the authority to permit Board agent testimony and disclosure of documents under Section 102.118, Rules and Regulations. A complete description of the authority delegated by the General Counsel under Section 102.118 of the Rules, is outlined in ULP Manual Section 11824.1.

10660.2 Preparing Supplementary Tabulations; Explaining Computation; Answering Defenses

Occasionally following review and analysis of the subpoenaed records, it may be advisable to prepare and offer into evidence amended attachments to the compliance specification, specifically outlining the updated, most accurate, calculations for the gross and net backpay figures available to the General Counsel. Sections 10648.10 and 10654; Sections 102.55(c) and 102.56(e), Rules and Regulations. Consideration should be given to the introduction into evidence of charts, tables, or summaries to illustrate the Compliance Officer's testimony. Where appropriate, summaries of relevant data obtained from subpoenaed records may be introduced into evidence to support the General Counsel's theory of the case or rebut respondent defenses. Rule 1006, Federal Rules of Evidence.

10660.3 Testimony of Discriminatees Regarding Gross Backpay Computation

On occasion, elements of the gross backpay calculation may be established through testimony of the discriminatees or other employees of the gross employer. For example, discriminatee or employee witness testimony may be used to establish the identity of the employee who replaced the discriminatee, changes in employment conditions during the backpay period and eligibility for fringe benefits, among other elements of the gross backpay calculation. Any prospective witness must be interviewed and properly prepared for trial. ULP Manual Sections 10334.2, 10334.4, and 10394.1–10394.10. Where appropriate subpoenas ad testificandum should be issued. ULP Manual Sections 11772 and 11774.

10660.4 Testimony of Discriminatees and Evidence Concerning Expenses

The General Counsel has the burden of establishing expenses incurred by discriminatees in seeking and holding interim employment that are deductible from their interim earnings. Sections 10556 and 10648.4. Expenses may be established by discriminatee testimony even where there is no documentary evidence of expenses. The trial attorney should prepare the discriminatees for such testimony. See Sections 10394.1–10394.10. ULP Manual Sections 10334.2 and 10334.4. During prehearing preparation or during hearing testimony, if new expenses are established, the General Counsel should prepare and offer into evidence revised attachments to the compliance specification, setting forth the updated, most accurate expense and net backpay figures available to the General Counsel.

10660.5 Preparation of Discriminatees for Examination by Respondent

Respondent's counsel may examine the discriminatees concerning their efforts to seek work during periods of unemployment. When this is expected, the trial attorney should interview and prepare the discriminatee for testimony concerning the details of interim employment, earnings, expenses, and search for work. Although much of this

information is not within the General Counsel's burden of proof, the trial attorney should prepare the discriminatees for cross-examination regarding these matters. Prehearing preparation will ensure that each discriminatee's testimony will comport with the facts and be consistent and credible. As a result, the record will be clear and concise and will present the facts fully.[165]

Therefore, during prehearing preparation, all discriminatees should be cross-examined in preparation for the kind of cross-examination they will receive at the hearing, particularly concerning their efforts to find work during periods of unemployment and low earnings. The trial attorney should instruct each discriminatee witness that the truth is expected at all times, regardless of who may be helped or harmed. ULP Manual Section 10334.4. As appropriate, they should be reminded that where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment. Section 10550.5

The respondent may not examine the discriminatees or present other evidence regarding their interim employment, earnings, expenses, and search for work, unless respondent has raised these issues in its answer. Objections should be appropriately raised. Section 10652.2; Section 102.56(b) and (c), Rules and Regulations.

The trial attorney should review with each discriminatee his/her anticipated testimony regarding interim employment, earnings, expenses, and search for work. Each discriminatee should be prepared to account for his employment history during the backpay period. All relevant documents should be reviewed with each discriminatee to refresh his/her recollection regarding search for work and employment during the backpay period.[166] Documentation may include:

- board affidavit,
- questionnaires they provided to the Compliance Officer during the backpay period,
- pay slips,
- earning reports and W-2 tax statements received from interim employers,
- records supplied to or received from state unemployment departments,
- union hiring hall and fund contribution records,
- help wanted advertisements regarding jobs where they applied,
- detailed calendars or diaries.

It is common in certain trades, such as construction, for employees to maintain, detailed calendars or diaries regarding their interim employment. The trial attorney should specifically ask each discriminatee what writings, if any, they have reviewed in

[165] For general principles regarding interviews of witnesses, see ULP Manual Sections 10054.2 and .3; regarding credibility, see ULP Manual Section 10064.

[166] See generally, Rules 612, 613, 801, and 803(5) of the Federal Rules of Evidence. See also ULP Manual Sections 10394.6–10394.10; Division of Judges Bench Book Sections 13-612, 13-613.

preparation for the compliance hearing.[167] ULP Manual Sections 10394.6–10394.10. Relevant documents should be prepared for introduction into evidence, including records received from state unemployment departments.[168] Each discriminatee should be prepared to testify as precisely as possible regarding the names of the firms where they sought interim employment, whether they filed written applications, the dates they filed applications or made job inquiries, and the names of the individuals they spoke with at each firm.

10660.6 Expert Witness Testimony

In appropriate cases, the General Counsel should consider offering expert witness testimony at the compliance hearing. This may be particularly appropriate in cases where gross backpay, interim earnings, reimbursable expenses, or other monetary remedies were calculated using statistical sampling or modeling techniques. These techniques may be used in cases involving numerous discriminatees or where interim earnings data is difficult to obtain or extremely time consuming to analyze, such as in cases involving strikers, hiring hall referrals, or numerous construction sites. Sections 10548–10548.3. The expert witness may be an accountant, a statistician, a financial consultant, a management professor, or a labor economist knowledgeable regarding the local labor market conditions during the backpay period. Where the Region is considering payment of special fees for expert testimony, clearance should be sought from the Division of Operations-Management.

Rule 702 of the Federal Rules of Evidence sets forth the standard for the admissibility of expert testimony at trial:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. . . .

To be admissible, expert testimony must not only be relevant, but reliable.[169] Once received, the administrative law judge may disregard expert testimony if the analysis and conclusions are based upon flawed premises.[170]

If a party seeks to present expert witness testimony at the hearing, among the factors the administrative law judge will consider are "whether the party has given prior notice to the opponent, [whether the party has] supplied copies of any documents or test results [to the opponent], and whether there has been time for the opponent to [obtain] opinion testimony by an expert of the opponent's selection." Division of Judges Bench Book Sections 13-226; Rules 403 and 702 of the Federal Rules of Evidence. Affirmative efforts should be made by the trial attorney to ascertain whether respondent intends to

[167] At the beginning of examination by respondent counsel, the discriminatee may be asked to state what writings he reviewed prior to testifying. The administrative law judge may require that any reviewed writings be produced to respondent for use during the witness' examination. See Rule 612(2) of the Federal Rules of Evidence.

[168] Records regarding unemployment compensation may include unemployment compensation booklets, noting the dates when the discriminatee applied for unemployment compensation. Records received from state unemployment departments often may be obtained from the state unemployment department and prepared for introduction into evidence in a manner providing for their self-authentication at trial. See Rule 902 of the Federal Rules of Evidence.

[169] See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 585–586 (1993).

[170] See *Food & Commercial Workers Local 1357*, 301 NLRB 617, 619, 621–622 (1991). See Division of Judges Bench Book Sections 13-220, 13-221.

call an expert witness during its defense case and, if so, the identity of that witness. Specific inquiry should be made by the trial attorney during the prehearing conference with the administrative law judge regarding whether respondent intends to call an expert witness, if this information has not be clarified beforehand. Section 10660.8. Where respondent discloses that it will call an expert witness at the hearing, the trial attorney should carefully prepare for the cross-examination of respondent's expert witness. Appropriate rebuttal witnesses should be subpoenaed and interviewed prehearing. Additionally, in consultation with Regional management, a decision should be made expeditiously regarding whether it is beneficial for the General Counsel also to present expert witness testimony at the compliance hearing.

For example, to support its contention that a discriminatee failed to mitigate, the respondent counsel may call an expert witness familiar with the labor market in the area where most of the discriminatees were living and seeking work during the backpay period. Where appropriate, in preparation for cross-examination and rebuttal, the trial attorney should interview knowledgeable local officials of the state employment service and knowledgeable union officials, particularly of skilled trades unions, to obtain a complete understanding regarding what impact, if any, the local market conditions had on the search for work of people with the skills and experience of the discriminatees. Information regarding local area, private sector, employment and unemployment rates during the backpay period, may be obtained from the U.S. Department of Labor, Bureau of Labor Statistics. www.bls.gov. This website also provides information regarding private sector gross job gains and losses by industry. Links are provided to state work force agencies.

The respondent's witnesses may be expected to testify concerning the number of job vacancies that existed in the employment area during the backpay period. The trial attorney, on the basis of pretrial interviews, should be prepared to elicit testimony concerning not only the number of job vacancies, but the number of vacancies within the job experience and background of the discriminatees, the rates of pay offered and the number of people remaining unemployed on the rolls of the state employment service or union simultaneous with the existence of the job openings.

10660.7 Settlement Judge

If settlement efforts have not been successful following the issuance of the compliance specification, the Region should consider whether a settlement judge would be beneficial. Most often, participation by the Compliance Officer at this conference is beneficial. Section 102.35(b), Rules and Regulations, provides for the assignment of an administrative law judge (herein a settlement judge), other than the trial judge, to conduct conferences and settlement negotiations, if all parties agree to the use of the procedure. See also Section 102.59, Rules and Regulations. See ULP Manual Sections 10351 and 10154.2 for a complete discussion of settlement judge prehearing conferences. See also Division of Judges Bench Book Section 9-900.

10660.8 Prehearing Conferences with Administrative Law Judge

The administrative law judge may conduct, at the request of the parties or on the judge's own initiative, a prehearing conference prior to the hearing's opening. The conference provides the opportunity to:

- further explore settlement,
- discuss potential stipulations and joint exhibits,
- the order of evidence presentation and witness testimony at hearing,
- resolve outstanding subpoena issues,
- clarify the pleadings and theories set forth in the compliance specification and answer,
- advise the judge of any anticipated hearing issues,
- advise the judge of the need for foreign language witness interpretation,[171]
- advise the judge of a party's intention to call an expert witness,
- provide the opportunity to refresh the judge's knowledge regarding the specific burdens of proof accorded the General Counsel and respondent, regarding the compliance specification and answer as set forth in Sections 102.55 and 102.56 of the Rules and Regulations.

Sections 10648.4–10648.6 and 10660.6; ULP Manual Section 10381; Division of Judges Bench Book Section 9-220.

10662 Conduct of the Compliance Hearing

10662.1 Overview

The conduct of a compliance hearing is governed in large part by the General Counsel's burden of proof, set forth in Section 10648.6, and Section 102.56 of the Rules and Regulations, which requires that the respondent raise its defenses in its answer. ULP Manual Sections 10380–10412 regarding hearings in complaint cases are also generally applicable to compliance hearings.

10662.2 Specificity of Answer, Motion to Preclude

If the respondent's answer is insufficient with respect to any allegations of the compliance specification, it is appropriate to move that the administrative law judge deem those allegations to be admitted and to preclude the respondent from litigating those issues at the compliance hearing. Section 10652.2.

The necessary legal research and the drafting and submission of the motion papers, showing in detail in what respects the respondent's answer was defective, should be done well in advance of the date of the hearing to permit the administrative law judge an opportunity to rule on them. This will establish in advance the ground rules that will govern the hearing when it starts. At the hearing, the trial attorney should not seek to prove the allegations that have not been properly answered, and should make appropriate objection if the respondent attempts to raise such matters in the hearing.

10662.3 Litigation of Compliance Issues

Generally, in compliance proceedings, the trial attorney should not assume any part of the respondent's burden or litigate backpay issues not properly placed in issue by

[171] See generally, Division of Judges Bench Book Section 13-607.

the answer, unless some gain to the case might be achieved. Sections 10648.4 and 10648.6. Normally, it will not aid the General Counsel's case to litigate defenses not properly raised by the respondent. However, there may be occasions when the General Counsel finds it advantageous to question a witness in its case on such matters as searching for interim employment or interim earnings. Such a situation would arise where the General Counsel determines that the evidence on the issue would best be presented through his or her own witness on direct examination (after careful preparation) rather than through cross-examination.

The trial attorney should be completely familiar with the case law arising under Section 102.56(b) of the Rules and Regulations and be vigilant that defenses not properly raised in the answer are not litigated at the hearing. The trial attorney should oppose all such efforts to do so and should not do so himself/herself.

In addition, although he/she may proffer evidence in areas in which the respondent has the burden of proof, the trial attorney should not only disavow in express words but should take particular care that by his/her conduct he/she do not place himself/herself in the position of assuming any burden of proof in areas that are properly the respondent's responsibility.

10662.4 Scope of the Region's Responsibility for Making Discriminatees Available as Witnesses for Respondent

Although the General Counsel may decide not to call any discriminatees as witnesses, the respondent will often desire to call discriminatees to prove its case. The trial attorney should cooperate with the respondent in its efforts to obtain the presence of the discriminatees to the extent that it is practicable and reasonable to do so.[172]

Upon request, the trial attorney should furnish respondent with the desired discriminatee's present or last known address so that the individual may be subpoenaed or located. Subpoenas may be requested by respondent to compel the appearance and testimony of uncooperative discriminatees at compliance hearings. Should the discriminatee object to revealing their address for good cause, that individual may properly be asked to voluntarily waive formal service (but not fees and mileage) so long as it is agreed that testimony will be given at the time requested by the respondent. Should failure to accept service tend to prolong or delay the proceedings, the discriminatee's location should no longer be treated as confidential unless the most compelling reason exists.

10662.5 Formal Exhibits

At the outset of the hearing, the trial attorney should mark as Exhibit 1 and introduce into evidence the following papers:

- Board decision and order,
- Court decision and judgment,
- Compliance specification and Notice of Hearing, and any amendments,

[172] For example, *Cornwell Co.*, 171 NLRB 342 fn. 2 (1968) ("[T]he General Counsel's function in producing backpay claimants for examination by Respondent is merely advisory and cooperative.") See also *Iron Workers Local 480 (Building Contractors)*, 286 NLRB 1328, 1334 (1987); and *Colorado Forge Corp.*, 285 NLRB 530, 541 (1987).

- Each Order Rescheduling Hearing,
- Affidavits of service,
- Respondent's answer and affidavit of service,
- Form NLRB-4668, Statement of Standard Procedure in Formal Hearing.

Relevant stipulations or documentation relating to proceeding to a compliance hearing before enforcement proceedings should also be introduced. Sections 10646.1 and 10606.2.

10662.6 Opening Statement

In the trial attorney's opening statement, he/she should normally state the factual and legal theory of the case. The trial attorney should be prepared to explain the various burdens of proof, where it appears appropriate to do so. Additionally, the trial attorney should present to the administrative law judge any problem of missing, distant, unavailable or deceased witnesses, clear up any problem with the use of the discriminatees as the respondent's witnesses and reasonably cooperate in securing their presence.

10662.7 Missing or Unavailable Discriminatees

If interim earnings are available for missing or unavailable discriminatees, their backpay claims should be treated like the claims of discriminatees who are present at the hearing. The burden of proving further offsets to backpay rests on the respondent.

If the respondent wants missing or unavailable discriminatees for testimony, the trial attorney should cooperate, such as by proposing to take depositions if credibility issues do not seem likely to become involved, or to move the hearing to a date, time, or place more convenient to the particular discriminatee. The trial attorney should argue in support of such procedures that the wrongdoer, rather than the injured party should bear the inconvenience and cost of travel. It is very important that the record reflect in the most detailed factual terms the cooperation proffered by the trial attorney to the respondent, whether it occurred before or at the hearing, and the fact that discriminatees were available to respondent as witnesses. To this end, the trial attorney should state, preferably in the opening statement, past offers and efforts of cooperation, as well as continued willingness to cooperate, and should elicit from the respondent its desires in the matter.

Before the hearing closes, counsel should summarize on the record all the respondent's requests for testimony by discriminatees and the result of the trial attorney's efforts at cooperation, lest it be subsequently claimed that the respondent was prevented from proving its defense(s). The administrative law judge should be requested to make findings concerning the gross backpay of missing or unavailable discriminatees for whom there is no interim earnings information. When these discriminatees are found, their interim earnings may be established and backpay paid. Section 10648.7. See also Section 10584 concerning the eventual extinguishment of backpay entitlement for a discriminatee who remains missing after compliance is otherwise achieved.

After a missing discriminatee has been found, a further compliance hearing may be held concerning interim earnings, mitigation, or any other issue that cannot be resolved informally.[173]

10662.8 Deceased Discriminatees

The trial attorney should offer evidence of gross backpay and expenses regarding deceased discriminatees if the respondent's answer has put these elements in issue. The affirmative allegations in the compliance specification concerning interim earnings and unavailability for employment should be sufficient to complete the case. The respondent bears the burden of establishing further reductions from gross backpay. See also Section 10648.8.

10662.9 Interim Earnings Documents

Upon request, documentation of interim earnings for all discriminatees should be given to the respondent's counsel to offer in the record. The trial attorney should be careful to state on the record that although the General Counsel does not have the burden of proving interim earnings and that this is the respondent's burden, an offer is being made of documentary information of such matters in the interests of accuracy, to expedite the hearing, and as part of the General Counsel policy to offer as much assistance as possible to the respondent in presenting information relevant to backpay issues for the consideration of the administrative law judge. Documents concerning interim earnings that are discloseable, in unredacted and redacted form, are described in Section 10650.5. See also ULP Manual Section 11824.1.

All of these documents should have been provided to the respondent's counsel in advance of the hearing if they were requested and respondent fully cooperated in the compliance investigation. See Section 10650.5.

If the respondent refuses to agree to the admission of such exhibits, the offer should nevertheless be made on the record but no effort should be made to have them admitted over respondent's objection unless it is indicated by the administrative law judge that they would be helpful. The trial attorney should make clear on the record that the evidence on interim earnings was made available to the respondent in advance of hearing.

10664 The General Counsel's Case

10664.1 Compliance Officer Testimony

It is the General Counsel's burden to prove by a preponderance of the evidence that the gross backpay formula and amounts are reasonable.[174] That burden is normally met by the introduction of evidence and Compliance Officer testimony. In cases involving complex computations of gross backpay, the testimony of the Compliance Officer who prepared the computation is usually extremely helpful to the administrative

[173] For example, *Brown & Root, Inc.*, 132 NLRB 486, 495–497 (1961); see 327 F.2d 958, 959 (8th Cir. 1964), clarifying court's opinion in 311 F.2d 447, 456 (8th Cir. 1963), on this point. See also *Continental Insurance Co.*, 289 NLRB 579, 585 (1988); *Colorado Forge Corp.*, 285 NLRB 530, 542 (1987).

[174] *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001).

law judge and presents a frame of reference for the introduction of supplementary exhibits.[175]

In the event the administrative law judge finds the entitlement of backpay of some discriminatees has changed on the basis of evidence introduced at the hearing, the Compliance Officer should also testify about adjusting the computation of backpay.

A respondent's proper allegation in its answer that the specification's gross backpay formula is incorrect or inappropriate will also set forth, with supporting data, an alternative method for computing gross backpay. The Compliance Officer may present testimony concerning the defects of the respondent's approach[176] or the defects may be relegated to argument by the trial attorney or included in a brief.

10664.2 Discriminatee Testimony

In most cases, the trial attorney should have a discriminatee testify only to prove expenses, to present facts necessary to the computation of gross backpay that cannot be otherwise established, and to anticipate known respondent defenses. Sections 10660.3, 10660.4, and 10662.3.

It is the General Counsel's burden to establish expenses incurred by a discriminatee. Section 10648.4. The discriminatee should, therefore, testify in detail concerning expenses incurred in seeking and maintaining interim employment, as well as, but not limited to, expenses incurred to replace employer benefits, such as medical coverage. Available documentation of expenses should also be presented. Because expenses incurred while seeking and maintaining interim employment have no effect on net backpay during quarters in which there were no interim earnings, testimony regarding expenses for such quarters is relevant only to establish efforts to seek employment.

10666 The Respondent's Case

10666.1 Respondent's Attack on Gross Backpay Computation

The respondent's attack on the General Counsel's gross backpay computation may take any number of forms. It will often be based on the testimony of company officials who will attempt to show that projected earnings alleged in the compliance specification were unreasonably high or that the earnings or hours of representative or replacement employees selected by the General Counsel were not representative of the probable earnings of the discriminatees.

When the respondent contests the validity of the representative complement of employees used to measure gross backpay, the trial attorney should consider whether, on rebuttal, the testimony of discriminatees or other employees would be helpful. The respondent may also present testimony or evidence to dispute fringe benefits claimed as elements of gross backpay.

Respondent's documents and employment records may be the best evidence of a discriminatee's entitlement to such benefits as vacations, bonuses and medical insurance.

[175] E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, 151 NLRB 972, 981–986 (1965); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 618 (1991).

[176] For example, *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, supra at 987–988; *Rainbow Coaches*, 280 NLRB 166, 173–178 (1986); *Big Three Industrial Gas*, 263 NLRB 1189, 1193–1196 (1982).

The respondent's witnesses may be cross-examined with regard to these documents and the respondent's practices with regard to the implementation of its benefits policies. The trial attorney may also find it advisable on rebuttal to question the discriminatees, other employees and, in the case of contractual benefits, appropriate union officials.

The respondent may attempt to prove that some change in its organization or operations terminated the backpay period because the discriminatee(s) would have been laid off at the time the change was made. This kind of contention should prompt a careful inquiry, including, as appropriate, an examination of relevant respondent records to determine what happened to other employees who worked in the same operation as the discriminatee(s). For example: were the employees affected by the change transferred to another operation, permanently laid off, or temporarily laid off and then recalled.

10666.2 The Respondent's Case Regarding Interim Earnings

The respondent may attempt to prove reductions from gross backpay by establishing interim earnings beyond those affirmatively alleged in the compliance specification. Evidence in the form of documents, testimony from other employers or witnesses and examination of the discriminatee may be used.

The trial attorney should scrutinize documents proffered to establish additional interim earnings and cross-examine witnesses who testify regarding additional employment.

The Compliance Officer and the trial attorney should ensure that discriminatees are aware that there are serious consequences for discriminatees who conceal interim earnings. The Board will deny any backpay for all quarters in which the discriminatee worked but concealed that information.[177] In the appropriate circumstance, the discriminatee may be denied backpay for the entire backpay period where the intentional concealment cannot be attributed to a specific quarter or quarters.[178] Section 10550.5.

10666.3 The Respondent's Examination of Discriminatees Regarding Mitigation

The respondent will often question the discriminatee in detail concerning the individual's search for work, including the names of firms to which the discriminatee applied, whether or not written applications were filed, whom the witness saw when application was made and other details.[179] The discriminatee may be asked whether he or she searched websites, reviewed newspaper want ads for available jobs or made job applications to other specific employers engaged in the same or similar business as the respondent. In this regard, the examination may also cover whether the discriminatee maintained a calendar or a diary setting forth search for work efforts. If appropriate, the questioning may also delve into whether the discriminatee sought employment through a hiring hall.

The respondent may also question the discriminatee concerning a claimed failure to mitigate by the discriminatee's accepting employment that is not substantially equivalent, voluntarily quitting an otherwise suitable job without justification or engaging in gross or deliberate misconduct that resulted in discharge. In the case of a voluntary

[177] *Performance Friction Corp.*, 335 NLRB 1117, 1121 fn. 25 (2001); *American Navigation Co.*, 268 NLRB 426 (1983).
[178] *Ad Art, Inc.*, 280 NLRB 985 (1986).
[179] See *Pope Concrete Products*, 312 NLRB 1171 (1993).

quit, the burden is on the General Counsel to show the decision to resign was reasonable. Where a discriminatee has been discharged by an interim employer, the Board will find a failure to mitigate if the discriminatee engaged in gross misconduct. Section 10558.4.

10666.4 Introduction Into Evidence of Newspaper Advertisements

The respondent may attempt to prove a lack of diligence in seeking interim employment by putting into evidence newspaper advertisements or other documentation showing the existence of jobs in the classifications of the discriminatees.

It should be argued that such evidence does not reliably establish either the general availability of jobs or that a discriminatee could have obtained a particular job. In oral argument or in a brief, it could be pointed out to the administrative law judge, if appropriate, that the advertisements said little about wage rates, working conditions, or the location of the position advertised. Further, advertisements did not show how many people applied for the jobs that were advertised and leave to pure speculation the likelihood that the discriminatees would have been employed.

10666.5 Contention of Willful Idleness Based on Testimony of Employment Agency

The respondent may also attempt to prove a lack of diligence through other testimony regarding the number of jobs available in the labor market during the backpay period.

Testimony of this kind should be thoroughly explored on cross-examination. To prepare for this, discussion in advance of the hearing with officials of the local state employment service may be appropriate. On cross-examination the respondent's witnesses should be requested to testify concerning the number of applicants in the skill classifications of the discriminatees who remained unplaced by the agency during the backpay period. The number of such persons who draw their maximum unemployment insurance benefits without obtaining a job should be obtained from the state employment service and placed in the record. In addition, testimony should be elicited from the witness, concerning jobs asserted to be available, to establish the location of job vacancies, their actual classifications, and the rates of pay offered. It may be argued that the discriminatees are not obliged to apply for or accept jobs if they are located relatively long distances from their homes, the rates of pay are excessively low, or they do not possess the required qualifications. If the witness is a person who does the hiring for another employer, they should be asked how many applicants are interviewed per job vacancy to be filled.

10666.6 Discriminatee's Decision Not to Return to Work

The respondent may also attempt to elicit testimony to the effect that discriminatees would not have returned to work at respondent by asking them whether they would have accepted reinstatement during the backpay period. The trial attorney should object to such a question on the grounds it is hypothetical.

Further, the Board has found it to be irrelevant that at some time prior to a valid offer of reinstatement, discriminatees have stated that they would not return to work. Section 10534.8 and cases cited therein.

10666.7 Respondent's Effort to Bar Reinstatement or Disparage or Discredit Discriminatees

The respondent may attempt to establish discriminatee misconduct in order to contend that, even in the absence of its unlawful action, the discriminatee would not have retained employment and that backpay should be tolled. The respondent assumes the burden of establishing that reinstatement is not warranted. Section 10532.4. Such contentions may be countered primarily through knowledge of the discriminatee's version of the alleged misconduct. If appropriate, the contentions should be challenged and testimony elicited to present the discriminatee in as favorable a light as possible.

Another defense against this type of attack is to investigate the possibility that other employees with like or worse records continued in the employ of respondent or that prior to the discrimination the respondent was aware of the misconduct and did not discharge the discriminatee.

10666.8 Rehabilitation of Discriminatees Regarding Mitigation

Respondent's examination or cross-examination of a discriminatee sometimes results in weaknesses in the record that were often caused by the confusion or misunderstanding of the discriminatee. Examination by the trial attorney should be undertaken with the aim to clarify earlier testimony and generally rehabilitate the discriminatee following examination by the respondent. Careful preparation in the advance of the hearing is very important in accomplishing the twin objectives of avoiding discriminatee confusion or misunderstanding as well as his/her rehabilitation, if required.

The goal, therefore, of the advance preparation is that, on examination, the trial attorney be able to bring out all the efforts made by the discriminatee during periods of unemployment to look for work, clarifying any testimony elicited by the respondent that varies with any documentary evidence or prior testimony. It is usually better to accomplish this through nonleading questions, where appropriate. If the discriminatee's credibility has been impugned, witnesses should be brought to the stand to corroborate the discriminatee's testimony.

As noted earlier, if the respondent establishes that the discriminatee quit an interim job, it becomes the burden of the General Counsel to demonstrate that the decision to quit was reasonable. Therefore, the trial attorney should be prepared to question the discriminatee with respect to the reasons the discriminatee voluntarily left any interim employment.

10666.9 Remote and Speculative Defense by Respondents

In some compliance hearings an unduly prolonged hearing and an unwieldy record may result from counsel pressing what can be characterized as rather remote and speculative claims to justify affirmative defenses. In the interest of keeping the length of the hearing and the record within reasonable bounds, the trial attorney may find it advisable to rely on the words of the Supreme Court as a basis for urging the administrative law judge to place some limits on the evidence that may be admitted on this issue:

> The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will

> thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).[180]

10668 Briefs to the Administrative Law Judge

Briefs are particularly helpful following compliance hearings, especially where a detailed analysis and explanation of payroll, unemployment, and other financial documents introduced into evidence will assist the administrative law judge in understanding the General Counsel's theory of the case. Similar to unfair labor practice trials, briefs also are advisable where the case involves difficult credibility issues, a long record or complex issues or where legal argument may be helpful to the administrative law judge. General briefing guidelines are set forth in ULP Manual Section 10410. Sections 102.42 and 102.59, Rules and Regulations.

When filing a brief to the administrative law judge following a compliance hearing, consideration should be given to the following points:

- It may be helpful to include charts, tables, and graphs in the brief to summarize voluminous or complex payroll or other financial records introduced into evidence.
- If the General Counsel has advanced an alternative theory at the hearing, the alternative calculations should be set forth in the brief, together with argument and case law supporting this alternative theory.
- If an alternative theory for calculating backpay or the make whole remedy is raised at trial, and the theory appears to be of particular concern or interest to the administrative law judge, the alternative calculations associated with this theory should be set forth in the brief, together with the General Counsel's argument and case law supporting or opposing this alternative theory.
- All requested remedies must be clearly articulated, including any special remedies. Argument and case law supporting the remedies requested should be provided.

10670 Bankruptcy

10670.1 Overview

In processing cases in which a charged party or respondent has filed a bankruptcy petition, the Region should promptly determine what actions should be taken to protect the Agency's interests in the bankruptcy proceeding and should thereafter become actively involved in the bankruptcy proceeding in order to maximize the opportunity for the Agency to obtain a recovery on its claim.

[180] See also *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968), enfg. 153 NLRB 1575 (1965); *Corning Glass Works v. NLRB*, 129 F.2d 967, 973 (2d Cir. 1942).

The Bankruptcy Code (Title 11, U.S.C.) is a Federal statute that permits an employer, whether a corporation, partnership, or sole proprietorship, to file a petition for bankruptcy. The possible venues for the filing of a bankruptcy case include where a company principally does business, where a company retains its principal assets, and where a company has its domicile or is incorporated.

The Supreme Court, in the *Nathanson* case, concluded that the Board is a creditor of a debtor in a bankruptcy case with respect to unpaid backpay awards.[181]

The Board is the only entity that has a right to file such claims[182] and the Board is the sole authority to liquidate its backpay claims.[183]

As a creditor, the Board's right to collect monetary relief from a debtor is affected by bankruptcy proceedings. It is therefore the responsibility of the Region to become aware of the existence of a bankruptcy case involving a charged party/respondent to thereafter timely file a Proof of Claim with the bankruptcy court and, as set forth below, with consultation as appropriate with the Contempt Litigation & Compliance Branch and/or the Special Litigation Branch, to take all other appropriate action to protect the Board's jurisdiction and its right to collect monetary relief from the debtor.

The general legal principles and basic rules governing the filing of Agency claims are summarized below in Section 10670.4. Sources for learning about the pendency of a bankruptcy case are summarized in Section 10670.3(a).

Agency unfair labor practice proceedings are administrative regulatory proceedings exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).[184] This is true whether the charged party/respondent is in bankruptcy under Chapter 11 or Chapter 7 of the Code.[185] Moreover, bankruptcy courts do not have jurisdiction under 28 U.S.C. § 1334 or 11 U.S.C. § 105 to impose a discretionary injunction on the Agency.[186] Additionally, the courts have found that neither the cost of litigation before the Agency, nor the potential for a backpay claim against the estate, constitute a "threat to the assets of the estate" so as to warrant a discretionary injunction.[187] The Special Litigation Branch should promptly be advised of the filing of any injunction proceedings against the Agency and any injunction pleadings should be provided as soon as possible.

See Appendix 18 for a sample letter that provides case authority and argument in support of the position that Agency proceedings are not stayed by the filing of a bankruptcy petition.

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[181] *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). See also *Tucson Yellow Cab v. NLRB*, 27 B.R. 621, 623 (Bankr. 9th Cir. 1983); *NLRB v. Killoren*, 122 F.2d 609, 613 (8th Cir. 1941).

[182] *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 265 (1940); *Nathanson*, supra; *In re Matter of Nicholas, Inc.*, 55 B.R. 212, 215 (Bankr. D. N.J. 1985); *In re Adams Delivery Service*, 24 B.R. 589, 592 (Bankr. 9th Cir. 1982); *In re Brada Miller Freight Systems*, 16 B.R. 1002, 1008 (N.D. Ala. 1981); *NLRB v. P.I.E. Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991).

[183] *Nathanson*, supra; *In re Bel Air Chateau Hospital*, 106 LRRM 2834, 2835 (C.D. Cal. 1980); *Tucson Yellow Cab*, supra at 623. Under Code Section 502 of the Bankruptcy Code, however, bankruptcy courts may undertake to estimate the amount of claims, including Board claims, if the liquidation of the claim by the Board would unduly delay the administration of the bankruptcy case. See Section 10670.4(d) for further discussion of this issue.

[184] *NLRB v. P.I.E. Nationwide, Inc.*, supra at 512; *NLRB v. Continental Hagen Corp.*, supra at 832–833, 834.

[185] Id.; see also *NLRB v. Twin Cities Electric*, 907 F.2d 108, 109 (9th Cir. 1990).

[186] *In re S.T.R. Corp.*, 66 B.R. 49, 51–52 (Bankr. N.D. Ohio 1986); *In re Caribe Inn*, 1989 WL 435473 (B.D.P.R. 1989). Cf. *Board of Governors v. MCorp Financial, Inc.*, 112 S.Ct. 459, 464–465 (1991).

[187] *Tucson Yellow Cab v. NLRB*, supra, 27 B.R. at 623; *In re Nicholas, Inc.*, 55 B.R. 212, 217 (Bankr. D.N.J. 1985); *In re Rath Packing Co.*, 38 B.R. 552, 562–563 fn. 6 (Bankr. N.D. Iowa 1984); *In re Brada Miller Freight Systems*, supra, 16 B.R. at 1007, 1012; *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325–327 (8th Cir. 1986).

As part of the bankruptcy process, debtors can accept or reject executory contracts, including collective-bargaining agreements.

In Chapter 11 cases, collective-bargaining agreements can be rejected only if the debtor meets the requirements of Section 1113 of the Code. These requirements include what may be described as good-faith bargaining with the union regarding the debtor's proposed changes in the terms of the collective-bargaining agreement. The debtor is required to bargain in good faith with the union about any changes that go beyond the scope of the Court approved changes. *Crest Litho, Inc.*, 308 NLRB 108 (1992).

In Chapter 7 liquidation cases, collective-bargaining agreements are subject to rejection under Section 365(d)(1). If the bankruptcy trustee does not accept or reject the contract within 60 days after the order for relief, the contract is deemed rejected retroactive to the petition date. In voluntary bankruptcy cases, the order for relief is the filing of the petition.

10670.2 Assistance With Bankruptcy Issues

Every Region should appoint a bankruptcy coordinator who is responsible to provide assistance to Region staff regarding bankruptcy issues. The responsibilities of the bankruptcy coordinator include processing information about a possible bankruptcy filing, determining whether a bankruptcy petition has been filed, reviewing bankruptcy pleadings and recommending or deciding what course of action the Region should take in response to a bankruptcy pleading.

Regions should contact the Contempt Litigation & Compliance Branch or the Special Litigation Branch for assistance with bankruptcy issues. Each branch is responsible for handling certain types of bankruptcy issues. If the Region is not sure which branch has jurisdiction over a particular matter, contact either branch for assistance. Set forth below is a list of the division of bankruptcy responsibilities between the respective branches.

Contempt Litigation & Compliance Branch:

- Section 363 "free and clear" sales,
- all asset-hiding cases including piercing the corporate veil, objections to discharge under Section 523, 727, and other Code sections, discovery involving alter egos/single employers, sources of backpay, and objections to the homestead exemption,
- issues concerning voluntary or involuntary conversion from Chapter 11 to Chapter 7,
- issues requiring the debtor to make proper distributions under the bankruptcy plan,
- objections to disclosure statements and plans based on financial criteria (for example, inadequate financial data, challenges to feasibility of plans, and inequitable distributions in plans),
- offensive use of equitable subordination under Section 510.

Special Litigation Branch:

- threats or efforts to enjoin or stay unfair labor practice, compliance, and representation cases (for example, Code Section 362 automatic stay and Code Section 105 "inherent power" injunction),
- Code Section 1113 rejection of collective-bargaining agreement issues that involve Agency jurisdiction (for example, retroactive rejection),
- objections to the Agency's claim,
- estimation proceedings under Code Section 502(c),
- objections to disclosure statements and plans which implicate the Agency's jurisdiction (for example, where a plan or disclosure statement effectively determines liability under the NLRA and liquidates the Agency's claim), or provides the bankruptcy court authority to enjoin proceedings against the reorganized debtor or to determine or liquidate liability of the debtor after confirmation of the plan.

Before participating in person in any bankruptcy court hearing or before filing a pleading in any contested or adversary proceeding in bankruptcy court, the Region should promptly submit the matter to the Contempt Litigation & Compliance Branch or the Special Litigation Branch, as appropriate. Contested or adversary proceedings would include, for example, situations where the Region intends to file:

- an objection or opposition to a complaint or motion for sale of property or other relief,
- an objection or opposition to a proposed Disclosure Statement or Plan of Reorganization,
- an objection to discharge of the debtor,
- a request for relief (other than a Proof of Claim/Application for Administrative Expense) to which the Region anticipates the debtor, trustee, or other creditors will object.

See Federal Rules of Bankruptcy Procedures 7001 and 9014 for a listing of Adversary Proceedings and Contested Matters.

The Region should assure that its legal staff is certified to file documents electronically with the bankruptcy courts located in the Region's geographic jurisdiction.

10670.3 Regional Office Procedures to Protect the Agency's Interests in a Bankruptcy Proceeding

10670.3(a) Identification and Processing of Cases Involving a Charged Party/Respondent in Bankruptcy

Regions should utilize various resources to determine whether a charged party/respondent is the subject of a bankruptcy proceeding. These resources include the parties and witnesses in an unfair labor practice case, the unfair labor practice charge,

newspapers and business journals, Regional staff members, and electronic sources of information utilized by the Agency such as PACER.

Once a Region receives notice that a charged party/respondent is in bankruptcy, high priority should be given to promptly analyzing the case to determine whether there is a reasonable possibility of obtaining a remedy through the bankruptcy case and to determine what action needs to be taken in the bankruptcy case to protect the Agency's interests. If there is a reasonable possibility of obtaining a remedy through the bankruptcy case, the case should be categorized as Category III. See Section 10694.2 regarding the factors the Region should consider when classifying cases in which bankruptcy petitions have been filed. If a court judgment has been entered in a case, the Region should notify the Contempt Litigation & Compliance Branch regarding cases in which the charged party/respondent is liquidating its assets in bankruptcy and the Region concludes that further proceedings would not effectuate the Act.

If a respondent files a bankruptcy petition, the Region should schedule unfair labor practice or supplemental compliance proceedings for the earliest possible date and advise the chief administrative law judge of the pending bankruptcy proceedings. It may also be appropriate to issue a compliance specification and litigate those issues at the same time as the unfair labor practice proceeding.

In Section 10670.4(e) below, various claim priorities are set forth. Backpay specifications should be drafted with sufficient detail to enable the administrative law judge and the Board to particularize the award in a manner that allows for the claiming of these priorities.

The Region should serve the bankruptcy case trustee with copies of all formal documents in the unfair labor practice or supplemental compliance proceeding. The trustee should not be named as a party respondent for the first time in a compliance proceeding. Unless the trustee directed unlawful conduct or was directing the debtor's business when the unfair labor practice occurred, the trustee should not be named as respondent in the underlying unfair labor practice proceeding.

In those cases where a complaint will issue or has issued against an individual or corporation that has been granted a discharge by a bankruptcy court, or against a corporation or partnership that is owned or operated by an individual that has been discharged in bankruptcy, the Region should consider the following bankruptcy principles:

Debts of individuals (11 U.S.C. § 727(a)(1)) and debts of reorganized entities are dischargeable by confirmation of a plan of reorganization (11 U.S.C. § 1141(d)). The Bankruptcy Code voids any judgment and enjoins the enforcement of any judgment on a debt that has been discharged. 11 U.S.C. § 524(a)(1) and (2). Thus, the Agency cannot seek to hold either individuals who have received a discharge or entities that have a confirmed plan liable for monetary obligations arising prepetition or prior to confirmation of a plan of reorganization, as a result of unfair labor practices. The pursuit of such a monetary obligation through the issuance of a complaint, compliance, or any other proceedings after the discharge in bankruptcy may result in the Agency being enjoined or held in contempt of court.

Because corporations and partnerships are not discharged through liquidations conducted in Chapter 11 or Chapter 7, there is no prohibition in the Bankruptcy Code against issuing or prosecuting a complaint which seeks to hold these entities liable for obligations or remedies under the National Labor Relations Act.

Cases in which the Region has issued a complaint or is considering issuing a complaint against an individual or entity discharged in bankruptcy should be submitted to the Division of Advice and the Special Litigation Branch. Where a court judgment or bankruptcy nondischargeability order has issued, a copy of the submission should also be forwarded to the Contempt Litigation & Compliance Branch. When recommending enforcement proceedings against a respondent that is liquidating its operations in a bankruptcy proceeding, the Region should specifically note this information in its submission for enforcement.

Regions should notify the Division of Operations-Management where a charged party/respondent corporation or partnership has been liquidated in bankruptcy and the Region intends to commence or continue the prosecution of the unfair labor practice case.

10670.3(b) Monitor the Progress of a Bankruptcy Case

The Region should monitor the progress of bankruptcy cases involving a charged party/respondent by reviewing bankruptcy pleadings as well as Chapter 11 monthly financial reports that are filed with the U.S. Trustee's Office. The Region may receive copies of such pleadings and reports by mail or by electronic means in jurisdictions that require electronic filing of documents. The Region should also monitor the progress of bankruptcy cases by use of electronic sources of information utilized by the Agency, including PACER, as well as the U.S. Courts website. The website address for PACER is www.pacer.psc.uscourts.gov/cgi-bin/links.pl and the website address for the U.S. Courts is www.uscourts.gov/links.html.

The Region should continue to monitor the progress of a bankruptcy case and take other appropriate action to protect the Agency's interests in the bankruptcy proceeding unless the Region determines that there is no reasonable opportunity to obtain a backpay remedy in the bankruptcy proceeding.

10670.3(c) Timely File a Proof of Claim

Proofs of claim should normally be filed as soon as possible after the Region has determined that the charge is meritorious and has issued complaint. However, when the time for filing the claim may expire before the determination of the merits of the charge, a Proof of Claim should be filed within the time allowed under the appropriate limitations provision set forth at Section 10670.4(c), attaching a copy of the charge and a brief statement regarding the basis for the Agency's claim. Where interim earnings are unknown or calculation of backpay would cause undue delay, the claim may be filed without such information or calculation, but with a brief statement that such specific dollar amounts will be included when the claim is amended at a later date.

The principles and rules set forth at Section 10670.4 should be followed in preparing the Agency's claim.

If a notice is issued in the bankruptcy proceeding which instructs creditors not to file claims because the case is a no-asset case, the Region may wait to file a Proof of Claim until such time as a notice is issued instructing creditors to file claims.

When there is an appeal of the dismissal of a charge involving a charged party in bankruptcy, the Region should telephonically request the Director of the Office of Appeals to expedite the appeal process. If the Region learns that the appeal cannot be decided within the period allowed for the filing of proofs of claims, the Region should file a protective Proof of Claim, noting in the claim that it will be withdrawn if the charge is finally dismissed.

10670.3(d) File Appropriate Notices With the Bankruptcy Court

The Region should file in the bankruptcy court and serve on the debtor and debtor's counsel (and the trustee where one has been appointed) (1) a notice of appearance and request for notice, (2) a notice of pendency of unfair labor practice proceeding, and (3) a request for a disclosure statement and plan of reorganization under Bankruptcy Rule 3017(a). The first and second are filed in all cases, while the third is only filed in Chapter 11 cases.

See Appendix 19 for a sample notice of appearance and request for notice, Appendix 20 for a sample notice of pendency of unfair labor practice proceeding and Appendix 21 for a sample request for disclosure statement and plan.

The notice of pendency of unfair labor practice proceeding should include a copy of the complaint and any administrative law judge, Board, or court decision.

10670.3(e) Review Bankruptcy Pleadings and Utilize Procedures Under the Bankruptcy Code to Determine If There Are Sufficient Assets to Pay the Agency's Claim

The Region should promptly and fully review bankruptcy filings and pleadings, including the debtor's bankruptcy petition and the various schedules filed by the debtor pursuant to Bankruptcy Rule 1007, to determine the amount of assets available to pay claims.

Section 341 of the Bankruptcy Code and Bankruptcy Rule 2003 provide that the U.S. Trustee or a designee presides at a meeting of creditors with the debtor. This is called the Section 341 or the first meeting of creditors, and is generally scheduled to occur about 20 to 40 days after the filing of the bankruptcy petition. A Regional representative should attend the Section 341/first meeting of creditors and, as appropriate, conduct an examination of the debtor. It is not necessary that the Regional representative at the creditors meeting be an attorney. (Section 341(c).)

Bankruptcy Rule 2004 provides that, on motion of any party in interest, the court may order the examination of any entity. In some jurisdictions creditors are permitted to initiate such an examination by the filing of a notice of such examination with the bankruptcy court. Since Code Section 341 meetings are generally fairly brief, a Section 2004 examination of the debtor may be necessary to have sufficient time to fully examine the debtor. The Region should conduct Bankruptcy Rule 2004 examinations as appropriate.

The scope of permissible examination of a debtor under Section 2004 or at the Section 341 meeting of creditors is very broad. For example, it may relate to the acts, conduct or property of the debtor, the liabilities and financial condition of the debtor, any matter that may affect the administration of the debtor's estate, and the debtor's right to a discharge. Sample motions to secure a court-ordered Section 2004 examination are located at the Special Litigation and Contempt Litigation & Compliance Branch sites on the intranet.

10670.3(f) File Appropriate Objections With the Bankruptcy Court

Nondischargeable Agency Claims: Although the debts of individual debtors are generally dischargeable under the Bankruptcy Code, certain debts can become non-dischargeable under Code Section 523. Thus, individual debtors have been precluded from obtaining a discharge of their debts based on their violations of Section 8(a)(3) and (5). See OM 94-20, OM 97-37, OM 03-05, In re Fogerty, 153 LRRM 3038 (Bankr. N.D. Ill. 1996); and In re Piper, 170 LRRM 2282 (Bankr. E.D. Mich. 2002).

The time for filing a nondischargeability complaint under Code Section 523 in a Chapter 7 or 11 case is no later than 60 days after the first date set for the first meeting of creditors under Section 341 (Bankruptcy Rule 4007). In a Chapter 7 or 11 case, the first meeting of creditors is normally held within 20 to 40 days after the filing of the petition (Bankruptcy Rule 2003).

Regions are reminded that the initiation of all nondischargeability actions under Section 523 must first be cleared with the Contempt Litigation & Compliance Branch.

Objections to Discharge Not Premised Upon Unfair Labor Practice Conduct: If an individual debtor engages in certain misconduct relating to the bankruptcy case, such as concealing information from creditors and the court or knowingly and fraudulently making a false oath or account, the debtor may be precluded from obtaining a discharge (Code Section 727).

A complaint objecting to the discharge of an individual debtor based on the debtor's actions must be filed in a Chapter 7 case no later than 60 days after the first date set for the first meeting of creditors under Section 341 (Bankruptcy Rule 4004). In a Chapter 11 reorganization case, such a complaint objecting to discharge must be filed prior to the first date set for the hearing on confirmation of the plan (Bankruptcy Rule 4004). There is no discharge for Chapter 11 debtors who are liquidating their assets.

Regions are reminded that the initiation of all nondischargeability actions under Section 727 must first be cleared with the Contempt Litigation & Compliance Branch.

Objections to Free and Clear Sales: If the business of the debtor is sold during the bankruptcy case as part of a court-approved free and clear sale, then the Agency may be precluded from thereafter obtaining any *Golden State Bottling* remedy from the successor.

While the Board has held that the Board's backpay award is not extinguished by a free and clear sale, *International Technical Products Corp.*, 249 NLRB 1301 (1980), Regions should not rely upon this case as a basis for failing to object to a free and clear sale.

The Contempt Litigation & Compliance Branch should be notified immediately of any proposal to sell the debtor assets "free and clear" of encumbrances.

Objections to Disclosure Statements and Plans of Reorganization: In a Chapter 11 case, the disclosure statement is the primary source of information about a plan of reorganization (or plan of liquidation) and its impact upon the creditors. Code Section 1125 requires adequate disclosure before solicitation of acceptances of a proposed plan. The disclosure statement should contain information about the debtor and its assets, as well as a projection of future earnings and financial soundness. The Region should evaluate whether the Agency's claim, including the priorities asserted, are accurately represented in the disclosure statement and whether sufficient additional information is provided to judge the feasibility of the debtor surviving after confirmation of a plan of reorganization.

The remedy for the debtor's failure to provide adequate information in the disclosure statement is for the debtor to amend the statement. The Agency's participation in the amendment process is helpful to ensure that the debtor knows the Agency's concerns regarding the statement and plan, to help prepare a foundation for an objection to the plan and, hopefully, to commence a dialogue with the debtor which can lead to settlement of the Agency's concerns.

On receipt of a disclosure statement and proposed plan, the Region should determine deadlines for objections to each and decide whether the disclosure statement properly describes the Agency's claim and contains information adequate to make a decision on whether to object to the plan.

In small business cases, defined as businesses with debts of $2 million or less, not including debts owed to affiliates and insiders, the bankruptcy court may determine that the plan itself provides adequate information and a separate disclosure statement is not necessary (Code Sections 101(51C), 101(51D), 1125(f)(1)).

In a Chapter 11 case, the plan of reorganization or plan of liquidation defines how each creditor group will be treated after confirmation. It is important for the Agency's claim to be properly classified and treated in the plan because the plan defines how the estate will be distributed and, if there is a reorganization, the order confirming a plan will discharge corporate, partnership, and individual debtor's preconfirmation liabilities. The plan should be reviewed as to the requirements listed in 11 U.S.C. § 1129 (including whether similar claims are classified and treated the same, whether priority claims are properly treated and whether a reorganization is financially feasible). The plan also needs to be carefully reviewed with regard to filing an objection to any provision that gives the court jurisdiction or authority to enjoin actions against the debtor, to determine and liquidate claims against the debtor, or otherwise to frustrate the Agency's ability to conclude its proceedings.

Regions should consult with the Special Litigation Branch or the Contempt Litigation & Compliance Branch regarding any questions they may have concerning disclosure statements and plans of reorganization. (Section 10670.2.) If the Region determines that it is necessary to file an objection, it should submit the matter to the appropriate branch.

10670.4 The Preparation and Filing of a Proof of Claim

10670.4(a) General Principles

All claims should be timely filed. A claim, other than an administrative claim, is filed by completing and timely filing the Proof of Claim form. The Proof of Claim form can be found on the web page of most Bankruptcy Courts.

The two basic elements of a claim that must be filled out are the amount of the claim and the priority of the claim, if any, as determined under the Bankruptcy Code. A statement should be included with the Proof of Claim form explaining the amount and priorities of the Agency's claim. The statement should also explain the basis for the Agency's claim and reference attached copies of any settlement, complaint, and decision issued by an administrative law judge, the Agency, and the circuit court.

Social security numbers for backpay claimants should generally not be included in a Proof of Claim or other bankruptcy pleading. To the extent that it is necessary to identify backpay claimants by social security numbers in any such document, only the last 4 digits of the social security numbers should be used.

Once a Proof of Claim is filed, the Agency's claim is deemed allowed unless an objection to the claim is filed by any party in interest. 11 U.S.C. § 502(a). The objection must be mailed to the Agency at least 30 days prior to the hearing on the objection. Bankruptcy Rule 3007. The Region should check the local bankruptcy rules to determine the due date for the Agency's response to the objection. Upon receipt of an objection to the Agency's claim, the Region should immediately submit a copy of the objection to the Special Litigation Branch for preparation of the Agency's response.

10670.4(b) Duplicate Claims

The Supreme Court concluded in the *Nathanson* case that the Board is the appropriate entity that has standing to file a claim based upon an unfair labor practice violation.[188] The Region should therefore normally file a Proof of Claim based upon the debtor's unfair labor practices even if another party has filed a claim that arguably duplicates part of the Agency's claim and even if the case has been deferred to the parties' arbitration process.

If the unfair labor practice proceeding only involves the issue of the failure to make wage payments or fund contributions pursuant to a collective-bargaining agreement, the Region should not file or pursue a claim for such payments if the union or the particular fund has or will timely file a Proof of Claim. However, if the Region determines that such a claim will not be timely filed by the union or the particular fund, the Region should timely file a claim relating to such payments or contributions. Section 10670.3(c).

10670.4(c) Deadline to File the Agency's Claim

In Chapter 11 cases, the court will set a bar date for filing claims. Bankruptcy Rule 3003(c)(3). This is sometimes done in the order setting the date for the first meeting of creditors.

[188] *Nathanson v. NLRB*, 344 U.S. 25 (1952).

The bar date for filing claims in Chapter 7 and 13 cases for Governmental units such as the Agency is 180 days after the date of the order for relief (Bankruptcy Rule 3002(c)(1)). The filing of the bankruptcy petition by the debtor constitutes the order for relief (Code Section 301). In some Chapter 7 and 13 cases, the court will send a notice pursuant to Rule 2002(e) that creditors do not have to file a Proof of Claim because there are no apparent assets in the estate. If the Region subsequently receives a notice from the Bankruptcy Court that the case has become an asset case, the Region must file a claim within 90 days after the clerk has mailed the notice that the case has become an asset case (Bankruptcy Rule 3002(c)(5)).

The Agency should file its Proof of Claim for nonadministrative claims before the bar date for filing claims. Administrative claims are filed by filing an application for allowance and payment of the administrative claim with the Bankruptcy Court. There will be a separate later bar date set by the court for filing administrative claims. If the Region determines that the bar date has passed before a claim is filed, consult the Special Litigation Branch regarding whether a claim should still be filed.

10670.4(d) The Amount of the Agency's Claim

The Agency is the sole authority to liquidate the amount of backpay claims.[189]

Under Code Section 507(a)(4), however, Bankruptcy Courts have the authority to estimate the amount of claims, including Agency claims, if the liquidation of the claim would unduly delay the administration of the case.

If there is a motion to estimate the Agency's claim, the Region should immediately submit a copy of such motion to the Special Litigation Branch for preparation of the Agency's response to such motion. The Agency should object to the court's estimating the Agency's claim to avoid the court's setting a limit on the amount for distribution.

The dollar amounts listed on the Proof of Claim form can be estimates based on the information provided to the Region during the investigation. Such a situation may arise where a Proof of Claim is filed without a review of the debtor's records or in the absence of interim earnings information from backpay claimants. If estimated dollar amounts are included in a claim, the statement attached to the Proof of Claim (Section 10670.4(a)) should note this fact. The statement should further note that the claim will be amended, if necessary, upon receipt of additional information by the Region.

Interest on a backpay award is allowed in Chapter 7, 11, and 13 cases. As a practical matter, the amount of interest for which any priority can be claimed will often be very minimal and may be time consuming to calculate.

Interest which accrues prepetition and is calculated based on prepetition backpay that is not entitled to priority can be claimed only as an unsecured claim with no priority.

Interest which (a) accrues during periods corresponding to the wage or fringe benefit priority period, (b) is based on backpay that accrued during the Code Section 507(a)(4) priority period or fringe benefit fund payments that accrued during the Code Section 507(a)(5) priority period, and (c) when added to the amounts claimed under Code

[189] Id.

Sections 507(a)(4) and/or 507(a)(5) does not exceed the current $10,000 per employee limit, can be claimed as a priority under Sections 507(a)(4) or 507(a)(5), as appropriate.[190] Any amounts in excess of the $10,000 limit per employee must be claimed as an unsecured claim with no priority.

Interest which accrues postpetition, regardless of the priority claimed for the principal backpay amount, can only be claimed as a separate amount with no priority for distribution pursuant to 11 U.S.C. § 726(a)(5) of the Code. Under this Code section, interest accruing postpetition is distributed only if there are estate assets remaining after all other claims (including general unsecured claims) are paid and there is money remaining that would be distributed back to the debtor or the owners of the estate. This rule for postpetition interest has been applied in cases of reorganization and liquidation under Chapters 7, 11, and 13.[191]

10670.4(e) Classification of the Agency's Claim

The Agency's claim may be classified, in whole or in part, as a secured claim, an unsecured claim with priority, or as an unsecured claim without priority.

The Agency has a secured claim if the Agency has a lien against the debtor's property. Such a lien could be based upon security that has been recorded regarding the debtor's property or a money judgment against the debtor that has been recorded as a judgment lien.

Any part of a claim that is not a secured claim is an unsecured claim. If the Agency's claim is unsecured it may have one or more of the following priorities:[192]

Second (administrative) priority. Where the bankruptcy petition was filed on or after October 17, 2005, backpay which accrues subsequent to the filing of the bankruptcy petition is claimed as an administrative expense under 11 U.S.C. § 503(b)(1)(A)(ii) and entitled to a second priority under 11 U.S.C. § 507(a)(2). Administrative priority in such cases will be allowed if the bankruptcy court determines that payment of such wages and benefits will not substantially increase the probability of layoff or termination of current employees or of nonpayment of domestic support obligations, during the case.[193]

Backpay which accrued subsequent to the filing of a bankruptcy petition which was filed before October 17, 2005 should be claimed in most jurisdictions as an administrative expense under 11 U.S.C. § 503(b)(1)(A) and is entitled to administrative priority under 11 U.S.C. § 507(a)(1).[194]

In the Ninth Circuit and in certain other jurisdictions, for bankruptcy cases that were filed prior to October 17, 2005, the Region should not claim administrative priority

[190] Senate Report 95-989, July 14, 1978, explains that under 11 U.S.C. § 726(a)(5), "interest accrued on all claims . . . which accrued before the date of the filing of the title 11 petition is to be paid in the same order of distribution of the estate's assets as the principal amount of the related claims."

[191] *In re Adcom, Inc.*, 89 B.R. 2 (D. Mass. 1988); *In re Riverside-Linden*, 945 F.2d 320, 323–324 (9th Cir. 1991); *In re San Joaquin Estates*, 64 B.R. 534 (Bankr. 9th Cir. 1986); *In re Beguelin*, 220 B.R. 94, 98–99 (9th Cir. BAP 1998).

[192] Effective for all bankruptcy cases filed on or after October 17, 2005, Section 507 is amended to add Section 507(a)(1) concerning claims for certain domestic support obligations. The designation of other sections under Section 507 is changed accordingly with former Section 507(a)(1) becoming Section 507(a)(2), and so forth.

[193] Code § 503, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, Pub. L. No. 109-8, 119 Stat. 23.

[194] *In re Bel Air Chateau Hospital*, 106 LRRM 2834, 2835 (C.D. Cal. 1980) (postpetition ULP); *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983) (same); and *In re Brinke*, 135 LRRM 2769 (Bankr. D. N.J. 1989), affd. 135 LRRM 2800 (D.N.J. 1989) (prepetition ULP, postpetition accruing backpay).

for backpay accruing postpetition where the unfair labor practice was committed prepetition.[195]

Sample administrative claim pleadings are available on the intranet under Enforcement Litigation/Special Litigation/Bankruptcy-Memos and Sample Pleadings.

Third (gap period) priority. In involuntary bankruptcy cases (cases where a party other than the debtor files the petition), backpay that accrues between the filing of the petition and the earlier of two events—the appointment of a trustee or the issuance of an order for relief-is entitled to third priority. 11 U.S.C. § 507(a)(3).

Fourth (wage claim) priority. Any backpay liability (excluding backpay amounts owed to employee benefit plans), up to a current maximum amount per employee of $10,000, that accrues during the 180 days prior to the filing of the petition or 180 days before the debtor ceases business, whichever occurs first, is entitled to fourth priority. 11 U.S.C. § 507(a)(4).[196] The current statutory amount and accrual period applies to cases that commenced on or after April 20, 2005, and is periodically adjusted to reflect changes in the cost of living.[197] If the loss that accrued during the 180-day period exceeds the statutory maximum allowed per employee, the excess amount is treated as an unsecured nonpriority claim.

Fifth (benefit fund) priority. Backpay representing unpaid contributions to employee benefit plans (such as pension funds and health and welfare funds), which accrued within 180 days prior to the filing of the bankruptcy petition (or the date that the debtor ceased operation, whichever occurred first), is entitled to a fifth priority to the extent that when added to the fourth priority amount the total amount does not exceed the statutory maximum allowed per employee. 11 U.S.C. § 507(a)(5). See footnote 194. Amounts in excess of the statutory maximum allowed per employee are treated as unsecured nonpriority claims.

To the extent an unsecured claim does not have priority, it is an unsecured non-priority claim (typically referred to as a "general unsecured claim").

10670.5 Obtaining Successful Results in Bankruptcy Cases

The Region should actively participate in bankruptcy cases to increase the chances of recovery on the Agency's claim. The Region should negotiate a settlement of the Agency's claim with the appropriate parties, including:

- The Case Trustee, if a Trustee has been appointed. If counsel for the Trustee has been appointed, the Region should deal with counsel for the Trustee, rather than the Trustee. A Case Trustee is appointed in all Chapter 7 bankruptcy cases, but rarely in Chapter 11 cases. (The U.S. Trustee's office does not itself actively administer individual cases, but may be contacted for

[195] *NLRB v. Walsh (In re Palau Corp.)*, 18 F.3d 746 (9th Cir. 1994); *Kapernekas v. Continental Airlines (In re Continental Airlines)*, 148 B.R. 207 (D. Del. 1992).

[196] For bankruptcy cases that commenced prior to April 20, 2005, the time period is 90 days rather than 180 days.

[197] The relevant dollar amounts to be applied as wage priority under Code Section 507(a)(4) (formerly 507(a)(3)) and for fund priority payments under Section 507(a)(5) (formerly 507(a)(4)) are as follows: for cases commenced on or after April 20, 2005—$10,000; for cases commenced between April 1, 2004 and April 19, 2005—$4925; for cases commenced prior to April 1, 2004—$4650.

assistance when it appears that there is abuse of the bankruptcy process or that the case is not being appropriately administered.)

- Counsel for the debtor, particularly if there is no appointed Case Trustee. The debtor's bankruptcy counsel is normally someone different from the attorney who represents the debtor in the unfair labor practice proceeding, and
- The Disbursing Agent, if the Agency's claim has not been resolved at the time a Disbursing Agent is appointed to disburse the estate assets pursuant to a plan.

The Region should also consider contacting counsel for the unsecured creditors committee, who can often provide the Agency with valuable information about a case.

The Region should inform the appropriate parties about the Agency's claim because trustees and other debtor representatives often have little or no knowledge about the Act. The Region should also send the Trustee or other debtor representative a copy of the Agency's Proof of Claim together with a letter explaining the basis for the claim.

10670.6 Settlement of the Agency's Claim

There is no requirement that the Region litigate the unfair labor practice case in order to pursue the Agency's claim. The claim can be settled as long as the Region has made a merit determination regarding the charge(s). Prior to attempting to negotiate a settlement of the Agency's claim, the Region should normally issue a complaint so the debtor, debtor's counsel, and the Trustee can better understand the factual and legal basis for the claim.

The Agency's claim in a bankruptcy proceeding can be settled by an agreement that is subject to bankruptcy court approval. Such an agreement should resolve both the amount and the priority of the Agency's claim.

The Agency's claim can be settled based upon a meritorious charge, a complaint, a settlement agreement, an ALJ decision, or a Board or court order.

The settlement document may be a formal or informal Agency settlement, or a stipulation in the bankruptcy proceeding, sometimes referred to as an "agreed entry."

A formal or informal Agency settlement agreement is an appropriate settlement document in a Chapter 11 reorganization case where the debtor is continuing to operate its business. Special language should be added to the settlement agreement because the employer is in bankruptcy. Sample language to be used can be found on the intranet under Forms/Unconverted Forms/SF4775 (Revised Settlement Form with Attachments, optional paragraph 8).

An agreed entry would be appropriate to settle the case if the debtor is out of business and has filed either a Chapter 7 or 11 case involving liquidation of all of the debtor's assets. An agreed entry on the Agency's claim, which is an agreement entered into by the debtor or the Trustee as well as the NLRB, sets forth the agreed amount and priority of the Agency's claim and is subject to approval by the Bankruptcy Court.

Prior to finalizing a settlement in a bankruptcy case, the Region should consult with the Contempt Litigation & Compliance Branch or the Special Litigation Branch regarding any situation where such approval would affect the Board's position in the pending bankruptcy proceeding or where the settlement involves any nontraditional backpay remedies.

10670.7 Payment of the Agency's Claim

In Chapter 7 cases and Chapter 11 liquidation cases the Agency's claim is normally paid after the Trustee/debtor-in-possession files the final report with the Bankruptcy Court. In Chapter 11 reorganization cases and Chapter 13 cases, the Agency's claim is paid at such time as is provided by the plan of reorganization/repayment plan.

The bankruptcy estate may pay the Agency's claim by issuing one check made payable to the National Labor Relations Board or by issuing individual checks to the discriminatees who are entitled to receive backpay based upon the Agency's claim. Because of the expense involved to the bankruptcy estate in issuing individual checks to discriminatees, trustees/debtors often want to issue a lump sum check to the Agency to pay the Agency's claim. The Region should submit such lump sum checks to the Finance Branch with appropriate information regarding the distribution of the backpay. Section 10580.3. Since the payment of the Agency's claim is often on a prorata basis, the Region should submit to the Finance Branch the prorata amounts to be received by each discriminatee. Sections 10586 and 10588.

If the Agency's claim is for backpay for employees as contrasted to fund contributions or payment of dues to a union, the debtor is also normally responsible to pay to the IRS the employer's matching FICA contribution (about 7 percent of the backpay amount received by each discriminatee).

If the issue regarding payment of the matching FICA contribution is not specifically addressed by the terms of the settlement, the responsibility for such payments remains with the estate. In such circumstances, the Finance Branch will not normally make any deduction for the employer's portion of FICA from the backpay distributed to discriminatees. The Finance Branch will inform the IRS that the debtor/respondent is responsible for such payments. As with any similar lump sum settlement situation where the Agency distributes the backpay, the Finance Branch will also prepare and send W-2 forms to each discriminatee who has received such a distribution. Section 10578.7.

If the Region is unable to locate some of the discriminatees who are entitled to backpay pursuant to the Agency's claim and a lump sum payment has been made to the Agency by the bankruptcy estate, then the undistributed funds may be able to be redistributed to the remaining discriminatees up to a year from the date of the Board's receipt of the backpay. Section 10588.

Some Chapter 11 plans of reorganization provide that money not claimed must be returned to the debtor. If the Region is concerned about locating discriminatees, the Region should seek an agreement with the debtor that the backpay for employees who cannot be located can be redistributed prorata to other employees owed backpay.

If the bankruptcy estate has issued individual checks to the discriminatees, the checks are normally valid for a very limited period of time (often 60 days or less from the date of issuance). When the checks are no longer valid, they should be returned to the Trustee/debtor with a request that new checks be issued and forwarded to the Region. If the Trustee/debtor refuses to issue new checks, the amount of the checks will probably be deposited in an escrow account with the Bankruptcy Court.

If backpay checks are deposited in such an escrow account, the Region should file a motion with the court for distribution of the backpay held in escrow. Such a motion will normally be filed after the discriminatees/heirs are located or it is determined that they cannot be located and the money should be redistributed to other previously located discriminatees (again, assuming that such previously located discriminatees have previously received a distribution of less than full backpay). The Region should consult with the Contempt Litigation & Compliance Branch regarding this type of situation.

10672 Protection of Agency's Interest, Collection of Monetary Judgments and Derivative Liability

10672.1 Pleading Appropriate Business or Union Entity

Although it is always important to properly state the full corporate name of the respondent in unfair labor practice litigation, it is particularly important that the proper corporate name is utilized in the caption when it is necessary to commence collection proceedings to enforce a liquidated backpay judgment. Failure to correctly name the respondent may seriously impede or nullify the effectiveness of collection actions under the Federal Debt Collection Procedures Act (FDCPA) (28 U.S.C. §§ 3001–3307). Accordingly, Regions should check with corporation division officials at the appropriate Secretary of State office, either electronically using the intranet or database search service (AutoTrak), or telephonically, before submitting a supplemental backpay order for enforcement. The Regions should also periodically check with state corporation officials to determine the continued existence or change in name, of corporate respondents.

The same holds true for partnerships and sole proprietorships. Care should be used in fully naming the partnership and its general and managing partners. Partnership records, like corporate records, may be obtained from the appropriate Secretary of State office. For sole proprietorships, both the full trade name (including all "doing business as" designations) and the name of the owner of the business should be accurately stated in the caption.[198]

10674 Prejudgment Protection of Respondent's Assets From Sale, Transfer, Fraudulent Conveyance, or Dissipation of Respondent's Assets

10674.1 Overview

When financial liability is asserted and there is reason to believe the Agency's ability to collect may become impaired for any reason, steps should be taken immediately and before entry of a judgment liquidating backpay to protect the Agency's claim. See

[198] Many counties and local jurisdictions also require noncorporation businesses using any name other than the owner's to file an alias affidavit with their recording offices.

Section 10508.6 for a list of such triggering actions (for example, close of business, sale of major assets and starting up a new business providing same services). See Section 10678 regarding post judgment procedures.

The Region should take all necessary steps, consistent with the need for prompt judicial relief, to determine whether the respondent is engaging in actions for the purpose, or with the foreseeable effect, of impairing the Agency's ultimate ability to collect its judgment. The investigation should generally be directed not only at the respondent, but also at any third parties (who often are more forthcoming) that may have relevant documentary and testimonial evidence. See Section 10626 regarding investigation of assets and ability to pay as well as Section 10618.

10674.2 Injunctive Relief/Protective Restraining Orders

Following a determination to issue a complaint and at reasonable intervals thereafter, the Region should assess the likelihood of the respondent rendering itself, or otherwise becoming incapable, of complying with the monetary provisions of an eventual Board order or court judgment. Section 10508.4. The respondent's financial condition should be closely monitored, particularly in those cases involving previous use of alter egos or other manipulations of corporate form to evade liability; cases involving a number of closely held corporations formed for similar business purposes and controlled by the same owners; or cases involving threats to cease or relocate operations in response to organizing campaigns, union demands for recognition, investigative inquiries, or litigation. When it appears that a respondent may be in the process of rendering itself incapable or significantly less capable of complying with the monetary provisions of an existing or potential Board order or court judgment, or is otherwise attempting to render such provisions ineffective, the Region should, after appropriate investigation, recommend that injunctive relief be sought against such conduct pursuant to Section 10(e) or (j) of the Act. The following factors should be considered.

10674.3 Availability of Relief

Injunctive relief against dissipation of assets or similar conduct is available at any stage of a case following issuance of an unfair labor practice complaint. Generally, relief is sought under Section 10(j) from issuance of a complaint to issuance of a Board order; thereafter, relief is sought under Section 10(e).[199] Depending on circumstances, available relief includes: asset freezes, limiting the use of the respondent's assets to specified purposes;[200] injunctions against specific transactions or types of transactions; as well as other less intrusive forms of relief such as monitoring and reporting requirements.[201]

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[199] *Maram v. Alle Arecibo Corp.*, 110 LRRM 2495 (D.P.R. 1982) (Sec. 10(j)); *NLRB v. Kellburn Mfg. Co.*, 149 F.2d 686, 687 (2d Cir. 1945) (Sec. 10(e)).

[200] Asset freezes are typically tailored to minimize interference with a respondent's legitimate operations, and generally permit unfettered use of assets once the respondent provides security, usually in the form of a bond or escrow account, for its extant or potential liability. *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1351 (2d Cir. 1974), cert. denied 417 U.S. 932 (1974); *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1106 (2d Cir. 1972); *NLRB v. A. N. Electric Corp.*, 141 LRRM 2386 (2d Cir. 1992); *Aguayo v. Chamtech Service Center*, 157 LRRM 2299 (C.D. Cal. 1997); *NLRB v. Horizons Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998).

[201] See generally *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291–292 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–398 (1946); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287–290 (1940). For prejudgment garnishment protection under the Federal Debt Collection Procedures Act, see *NLRB v. Westchester Lace*, 178 LRRM 2815 (D.N.J. 2005).

10674.4 Criteria for Seeking Injunctive Relief/Consideration of Alternative Strategies for Protecting Claims

Generally, whenever there is reasonable cause to believe that a respondent is attempting to evade existing or potential backpay liability and injunctive relief would preserve the status quo and permit effectuation of meaningful relief, it would be appropriate to recommend that injunctive relief be sought.[202] Examples of appropriate circumstances for seeking relief would include:

- sales, auctions, closings, foreclosures, or liquidations of a respondent's business that are undertaken without provision for satisfying potential monetary liability under the Act,
- actual or potential distributions of the respondent's assets to its principals or insiders,
- asset transactions between a respondent and affiliated businesses or relatives, friends, or close business associates of the respondent's officers or principals,
- any other circumstances suggesting the possibility of fraud or deliberate measures designed to render a respondent judgment-proof, or unable to comply.

Injunctive relief generally is either inappropriate or of limited utility in cases involving assets already in the control of the court such as bankruptcy, probate or receivership cases. Furthermore, injunctive relief may be of limited benefit in cases where the respondent's assets have already disappeared, unless such relief is ancillary to contempt proceeding or supplementary administrative proceedings that implead previously unnamed derivatively liable parties. In these latter circumstances, the Region should consider the potential effectiveness of initiating contempt proceedings, proceedings seeking prejudgment relief under the FDCPA in district court, supplementary administrative proceedings against derivatively liable persons, or proceedings to set aside fraudulent conveyances.[203]

Special considerations apply in bankruptcy because of the automatic stay provisions of the Bankruptcy Code (11 U.S.C. § 362). Nonbankruptcy injunctive relief relating to a bankrupt respondent's use of its assets is generally inappropriate because of the stay. However, at least in cases when ongoing financial misconduct of a debtor's management threatens to frustrate compliance, limited injunctive relief to freeze assets of the respondent with a receiver or court appointed officer may be excepted from the stay and therefore appropriate.[204] Moreover, the automatic stay applies only to actions taken against the respondent; generally speaking, therefore, actions against corespondents or

[202] *Maram v. Alle Arecibo Corp.*, supra at fn. 1 (Sec. 10(j)); *Auto Workers (Ex-Cell-O Corp.) v. NLRB*, 449 F.2d 1046, 1050–1051 (D.C. Cir. 1971) (Sec. 10(e)).

[203] *NLRB v. C.C.C. Associates, Inc.*, 306 F.2d 534, 539–540 (2d Cir. 1962) (use of supplementary administrative proceedings, including investigative subpoenas, to establish derivative liability of corporate principals); *Concrete Mfg. Co.*, 262 NLRB 727, 727–729 (1982) (use of supplementary proceedings after liquidation of backpay to determine derivative liability); *U.S. v. Neidorf*, 522 F.2d 916, 917–920 (9th Cir. 1975), cert. denied 423 U.S. 1087 (suit against fraudulent transferees of corporate assets); *In re Kaiser*, 722 F.2d 1574, 1582–1583 (2d Cir. 1983) (attack on fraudulent bankruptcy).

[204] The stay excepts from its operation certain exercises of police and regulatory power (11 U.S.C. § 362(b)(4)). These exceptions permit nonbankruptcy injunctive relief that affects a debtor's assets in some cases. See *CFTC v. CO Petro Marketing Group*, 700 F.2d 1279, 1283–1284 (9th Cir. 1983); *SEC v. First Financial Group of Texas*, 645 F.2d 429, 437–440 (5th Cir. 1981); *FTC v. R. A. Walker & Associates*, 37 B.R. 608, 610–612 (D.D.C. 1983).

third parties that have not filed for bankruptcy are not automatically stayed. The Contempt Litigation & Compliance Branch should be consulted for guidance or assistance in this area.

In assessing the appropriateness of recommending injunctive relief, it should be recognized that, in many cases, injunctive relief is more likely to ensure prompt success in achieving ultimate compliance than most post judgment measures.

10674.5 Submitting the Recommendation

Recommendations for protective order injunctive relief should be promptly submitted, as indicated below, with a copy to the Division of Operations-Management:

- from issuance of complaint to issuance of Board order-Division of Advice (Associate General Counsel and Assistant General Counsel, Injunction Litigation Branch),
- from issuance of Board order to issuance of court judgment-Division of Enforcement Litigation, Appellate Court Branch (Deputy Associate General Counsel),
- after issuance of a court judgment–Division of Enforcement Litigation, Contempt Litigation & Compliance Branch (Assistant General Counsel).

A special problem arises when a Board order or court judgment has issued against a respondent, but interim relief appears to be warranted against one or more previously unnamed third parties, as to whom liability could be determined in either a supplemental administrative proceeding or in a contempt proceeding. In this situation, the Region should submit its recommendation to all of the above branches with a recommendation that they consult as to the appropriate course of action.

10674.6 Form and Content of Recommendation

As time is of the essence, the appropriate branch or division should be advised telephonically that a recommendation is forthcoming. Generally, the respondent should not be given advance notice of the Region's intention to make such a recommendation because of the limited deterrent value of such notification and because experience indicates that notification may impede the Board's ability to obtain relief, for example, by causing a respondent to accelerate its evasive conduct or by compromising confidential sources. The recommendation should be submitted as expeditiously as possible and include the following:

- A description of the status of the case, including citations to any reported Board or court decisions or the docket numbers, dates of issuance, and copies of any unreported decisions.
- A narrative outline of the conduct giving rise to the recommendation, based on as thorough an investigation as time permits.
- Any relevant exhibits or available affidavits[205] of witnesses, including Regional personnel if based on firsthand knowledge; the names, addresses,

[205] Under 28 U.S.C. § 1746, an unsworn declaration, made under penalty of perjury in the form prescribed in that statute, may be used in any Federal court proceedings in lieu of a sworn affidavit. References to affidavits herein shall include such declarations.

and telephone numbers of sources utilized in the Region's investigation of the conduct.

- The name, address, and telephone number of the respondent's counsel and, if appropriate, the names, addresses, and telephone numbers of other parties to any transaction or potential transaction involved in the recommendation or those of their counsel, if known.
- An affidavit of the Compliance Officer setting out an estimate of the respondent's current backpay liability, including accumulated interest.

10674.7 Regional Role During Pendency of Injunctive Proceedings

In view of the time sensitivity of injunctive litigation involving Headquarter braches, their requests to Regions for further investigation, either prior to initiating or during litigation, should be handled as expeditiously as possible.

Respondents who are subject to injunctive proceedings may resist cooperation with the Agency. Thus, a Region should not presume that any respondent will respect the pendency of injunction proceedings, or the issuance of an injunction itself, by refraining from evasive conduct. Accordingly, the Region should thoroughly monitor the respondent's activities to ensure that it does not take further steps to evade compliance.

Following issuance of the injunction, the Region should closely monitor the respondent's compliance with all injunctive provisions, particularly those requiring disclosure of information to the Region, turnover of documents or establishment of escrow accounts or other forms of security. Such monitoring may include requests to third parties for appropriate information; subpoenas may be served on recalcitrant third parties.[206] The Regions should promptly report any failure or refusal to comply with any provision to the appropriate Washington office.

10674.8 Notice and Constructive Notice to Third Parties of Protective Restraining Orders

Notice of Board and related proceedings should be given to all third parties actually or potentially involved in any significant asset transaction with a respondent, inasmuch as derivative liability against third parties unrelated to the respondent may depend on their having actual notice.[207] Similarly, *Golden State* successorship liability[208] and, of equal practical importance, an acquiring entity's ability to arrange with the original respondent for indemnification for such liability, also may turn on notice of the dispute. Section 10632.8. Accordingly, in any case in which it appears that actual or potential third parties are or may be engaging in significant asset transactions with a respondent, the following procedures should be followed.

On learning of the involvement of a third party in a current or potential transaction with a respondent that may impair the Board's ability to obtain compliance, the Region should ordinarily serve the third party with copies of the pleadings in the case

[206] If an injunction has been issued and contains a discovery provision, discovery may be had thereunder. In any event, investigation may be conducted by Section 11 subpoena. See Section 10618.1 regarding investigative subpoenas.

[207] See and compare, Fed.R.Civ.P. 65(d), under which injunctions are binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys," without regard to notice.

[208] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184–185 (1973).

(particularly the complaint or compliance specification and any decisions), as well as of any restraining orders in effect. An accompanying transmittal letter should set forth, briefly and in an impartial and nonadversarial manner, the reasons for service and a short statement of the third party's potential exposure, such as the amount or estimated amount of backpay due. Service should be by certified mail, return receipt requested, or by some other method that permits verification of delivery, including service by a Board agent.[209]

The intent of the letter should not be to impair the transactions, but rather to give notice of the pending proceedings and of the requirements of any existing restraining order (for example, that funds not be paid over to respondent) and of the recipient's potential liability for violating such an order. Care should be taken not to state or imply that the recipient will be held to be a successor, but rather to put the party on notice of pending proceedings and, if applicable, of the existence and requirements of any existing restraining order. See Section 10632.10 for notice in contempt cases. A sample letter is found in Appendix 22.

If the Region believes that, because of unusual circumstances notice should not be given, it should seek clearance from the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management.

The Region should continue to serve such documents, notwithstanding a third party's claim of lack of relationship to the respondent. Threats by the respondent or a third party to initiate litigation against the Board or its representatives on the basis of such notice (for example, a threat to initiate a suit based on tortuous interference with contractual advantage or to seek from a bankruptcy court an order approving a free-and-clear sale), should be referred to the Contempt Litigation & Compliance Branch, with a copy to the Division of Operations-Management. In the absence of contrary instructions, however, such threats should not deter efforts to make or continue service of such notices.[210]

10674.9 Use of Lis Pendens, Notice of Pendency, Notice of Interest or Similar Devices For Giving Constructive Notice, in Cases Involving Real or Personal Property

When the Agency has initiated an action seeking relief relating to a respondent's disposition of real property, the Region should, if state law permits, docket or record a notice of the pendency of such proceedings against the property involved. Generally, such notices are permissible only where there is an action pending that affects title to the property.[211] Under 28 U.S.C. §1964, it is incumbent on parties litigating in Federal district courts to comply with the requirements of state law authorizing such notice (with the significant exception that agencies of the United States are exempted from bonding requirements by 28 U.S.C. §2408). Therefore, when the need arises, Regions should thoroughly familiarize themselves with lis pendens laws in all states within their respective jurisdictions, determine the requirements for filing such a notice, and seek clearance from the Division that is processing the injunction proceedings prior to filing or recording such notice.

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[209] If time is of the essence, the material, or at least the essential portions of it, should be served by fax if possible.

[210] See Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq., 2680(h).

[211] See 51 Am.Jur.2d Lis Pendens Sec. 21 (1970); *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1319–1321 (3d Cir. 1982); *Cayuga Indian Nation v. Fox*, 544 F.Supp. 542, 547–548 (N.D.N.Y. 1982).

A notice of pendency, when permissible by law, serves as constructive notice to all subsequent purchasers and encumbrancers of the property, thereby tending for practical reasons to preserve the status quo during litigation and limit a respondent's ability to dispose of real property to bona fide purchasers. In addition, a notice of pendency may, in some states, be the only way to register an injunction.

Some jurisdictions also permit such notice to be utilized in actions affecting certain types of personal property; however, such notice is, like that applying to real property, inappropriate unless the litigation involved seeks to reach specific personal assets.[212] Where available, the use of such notice relative to personal property is subject to the same instructions as set forth above for real property.

As noted further below, in Section 10676, the FDCPA contains provisions for obtaining prejudgment relief, including prejudgment attachment. Under 28 U.S.C. § 3102(f), such attachment will create a lien in favor of the United States upon levy on the property pursuant to a writ of attachment. Regions should consult with the Contempt Litigation & Compliance Branch prior to initiating prejudgment actions under the FDCPA. Section 10674.5.

10674.10 Recording Unliquidated Judgments or Board Orders

The proceedings discussed above are generally required to protect Board monetary claims in the absence of a supplemental judgment liquidating backpay. If permitted by state statute, however, the Region may record unliquidated judgments or Board orders under applicable state law, which, at the very least, may provide notice to third parties who may have potential derivative liability.

10676 Prejudgment Writs of Garnishment, Attachment, Receivership, and Sequestration

The Federal Debt Collection Procedure Act (FDCPA), U.S.C. §§ 3101–3105, includes provisions for prejudgment relief, including, prejudgment garnishment (§ 3104), attachment (§ 3102), receivership (§ 3103), and sequestration (§ 3105) where the respondent is about to leave the jurisdiction of the United States (§ 3101(b)(1)(A)), has or is about to assign, dispose, remove, conceal, or destroy property (§ 3101(b)(1)(B)), has or is about to convert the debtor's property into money, securities, or evidence of debt (§ 3101(b)(1)(C)), or has evaded service of process by concealing himself (§ 3101(b)(1)(D)) with the effect of hindering, delaying, or defrauding the United States in its effort to recover a debt. See discussion in post judgment section. Sample forms can be found on the Contempt Litigation & Compliance Branch site on the intranet. Regions should consult with Contempt prior to initiating prejudgment actions under FDCPA.

10678 Post Judgment Collection of Monetary Judgments

10678.1 Overview

In cases where backpay has been liquidated in a court judgment, the Region has primary responsibility for collection. The Contempt Litigation & Compliance Branch will provide any needed advice and assistance to the Region.

[212] See generally 51 Am.Jur.2d Lis Pendens (1970).